

NORTH CAROLINA COURT OF APPEALS REPORTS

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TABLE OF CONTENTS

Judges of the Court of Appeals v

Superior Court Judges vii

District Court Judges xi

Attorney General xviii

District Attorneys xx

Public Defenders xxi

Table of Cases Reported xxii

Table of Cases Reported Without Published Opinions xxiii

Opinions of the Court of Appeals 1-597

Headnote Index 599

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1. Appointed 30 August 2012.
 2. Retired 31 August 2012.
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CASES REPORTED

	PAGE		PAGE
Andresen v. Progress Energy, Inc.	182	Reese v. Mecklenburg Cnty., N.C. . .	410
Bare v. Atwood	310	Schwarz Properties, LLC	
Bioletti v. Bioletti	270	v. Town of Franklinville	344
Bryson v. Haywood Reg'l Med. Ctr.	532	Shippen v. Shippen	188
Collier v. Collier	160	Stark v. Ford Motor Co.	1
Dawson v. N.C. Dep't of Env't & Natural Res.	524	State v. Bethea	587
Demeritt v. Springsteed	325	State v. Bivens	350
Dunn v. Cook	332	State v. Bowlin	206
Estate of Earley v. Haywood Cnty. Dep't of Soc. Servs.	338	State v. Brewington	68
Fish House, Inc. v. Clarke	130	State v. Brooks	193
Grantham v. Crawford	115	State v. Brown	567
High Rock Lake Partners, LLC v. N.C. Dep't of Transp.	55	State v. Brunson	357
Hudgins v. Wagoner	480	State v. Crowell	362
In re A.R.D.	500	State v. Dark	591
In re D.R.F.	138	State v. Ferguson	451
In re Foreclosure of Adams	318	State v. Huey	513
In re S.N.W.	556	State v. Johnson	259
In re W.V.	290	State v. King	198
Kornegay v. Aspen Asset Grp., LLC	213	State v. Lackey	153
Lee v. Winget Rd., LLC	96	State v. LePage	37
McCaskill v. Dep't of State Treasurer	373	State v. Mauck	583
Midkiff v. Compton	21	State v. McCormick	105
MRD Motorsports, Inc. v. Trail Motorsports, LLC	572	State v. Morton	578
N.C. Farm Bureau Mut. Ins. Co., Inc. v. Sadler	145	State v. Nunez	164
Nelson v. Bennett	467	State v. Paddock	280
		State v. Pettigrew	248
		State v. Pringle	562
		State v. Reid	122
		State v. Toledo	170
		State v. Walker	431
		State v. Yow	203
		Strickland v. City of Raleigh	176
		Taylor v. Town of Garner	300
		Tyburski v. Stewart	540
		War Eagle, Inc. v. Belair	548
		Whisnant v. Carolina Farm Credit, ACA	84

CASES REPORTED WITHOUT PUBLISHED OPINIONS

	PAGE		PAGE
Ayerza v. Cabarrus Cnty. DSS	595	In re T.M.S.	595
Beard v. Cumberland Cnty. Hosp.	210	In re W.Q.K.	595
Blackburn v. Duke Univ.	369	In re Will of Aiken	369
Brinn v. Weyerhaeuser Co.	210	J.T. Enter. v. Countrywide	
Brooks Millwork Co. v. Levine	595	Home Loans	370
Bullock v. Bullock	210	Lawson v. Elec. Data Sys.	210
Carolina Homes By Design		Lewis v. Purcell	595
v. Lyons	595	Lynn v. Guilford Cnty. Sch.	370
City of Asheville v. Huskey	210	Malone v. Steele	210
Clark v. Sutton	210	Martin v. Martin	595
Crocker v. Griffin	210	N.C. R.R. Co. v. Bell	210
Duruanyim v. Duruanyim	210	Parrott v. Kriss	210
Everett v. N.C. Dep't of Transp.	369	PPD Dev., LP v. Cognition	
Follum v. N.C. State Univ.	369	Pharm.	596
Gore v. Southwest Airlines Co.	210	Ragsdale v. Lamar	
Gray v. Gray	210	Outdoor Adver.	596
Hawkins v. Britesmilz Family	595	Sawyer v. Mkt. Am., Inc.	210
In re A.S.	210	Stahr v. N.C. Dep't of Transp.	596
In re C.B.	369	State v. Aguilar	596
In re C.E.L.	369	State v. Arthur	596
In re C.L.T.	369	State v. Autry	211
In re C.R.C.	595	State v. Barts	596
In re D.I.	595	State v. Battle	370
In re I.S.W.	369	State v. Blount	596
In re J.A.C.	595	State v. Boulter	596
In re J.D.W-S.	369	State v. Brown	211
In re J.P.	210	State v. Bunting	596
In re K.C.P.	369	State v. Campbell	370
In re K.O.L.	369	State v. Chiles	211
In re K.Q.R.	369	State v. Collins	370
In re L.D.B.	595	State v. Collins	596
In re M.A.F.	369	State v. Cooper	211
In re M.E.M.	595	State v. Delgado	370
In re M.G.	595	State v. Depaulis	370
In re M.W.	210	State v. Dickerson	370
In re Mobley	369	State v. Evans	370
In re O.M.B.	369	State v. Franklin	596
In re P.C.H.	369	State v. Frazier	211
In re P.R.B.	595	State v. Gordon	596
In re S.H.	595	State v. Granger	596
In re T.L.P.	369	State v. Greene	211

CASES REPORTED WITHOUT PUBLISHED OPINIONS

	PAGE		PAGE
State v. Gregory	370	State v. Stanley	371
State v. Grooms	596	State v. Taylor	211
State v. Hamm	596	State v. Taylor	212
State v. Harris	370	State v. Tucker	212
State v. Helms	596	State v. Turner	212
State v. Johnson	370	State v. Velasquez	597
State v. Lytle	597	State v. Weatherspoon	371
State v. Martin	370	State v. Wells	597
State v. McCoy	370	State v. West	597
State v. McDougald	597	State v. Whitted	597
State v. Miles	211	State v. Williams	212
State v. Milling	211	State v. Williams	597
State v. Molix	211	State v. Wilson	371
State v. Mora-Avila	371	State v. Wilson	371
State v. Moreno	211	State v. Witherspoon	212
State v. O'Shields	597	State v. Wright	212
State v. Oates	371	State v. Wynn	371
State v. Oxendine	371		
State v. Pendleton	371	N.C. State Bar v. Hunter	371
State v. Peterson	211		
State v. Robinson	597	Unifund CCR Partners v. Rowell . . .	597
State v. Rominger	371		
State v. Schwartz	597	Walker v. United Parcel Serv.	372
State v. Scott	597	White v. Oblinger	372
State v. Sexton	211	Williams v. Law Companies	
State v. Shelley	371	Grp., Inc.	212
State v. Simmons	211	Wirth v. Wirth	372
State v. Simmons	371		

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CHEYENNE SALEENA STARK, A MINOR, CODY BRANDON STARK, A MINOR, BY THEIR
GUARDIAN AD LITEM, NICOLE JACOBSEN, PLAINTIFFS-APPELLANTS V. FORD MOTOR
COMPANY, A DELAWARE CORPORATION, DEFENDANT-APPELLEE

No. COA09-286
(Filed 18 May 2010)

**1. Products Liability— defense—alteration or misuse—
seven-year-old child**

The products liability defense of alteration or modification was not applicable to a child under seven years of age injured by a seat belt because children that age are not capable of negligence. Defendant was unable as a matter of law to prove the requisite element of foreseeability inherent in the proximate cause portion of its N.C.G.S. § 99B-3 defense.

**2. Products Liability— defense—alteration or misuse—party
to action**

The trial court erred in a products liability action by denying plaintiffs' motion for a directed verdict on the defense of alteration or misuse where a father who was not a party to the action was alleged to have placed the seatbelt behind the child's back. The plain language of N.C.G.S. § 99B-3 states that the entity responsible for the modification or misuse of the product must be a party to the action in order for the defense to apply.

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

3. Costs— denial of directed verdict reversed—award of costs reversed

An award of costs in favor of defendant was reversed where the trial court's denial of plaintiff's motion for directed verdict on a products liability defense was reversed.

4. Products Liability— child injured by seatbelt—evidence sufficient

Plaintiff presented sufficient evidence to survive defendant's motions for summary judgment and directed verdict where a child was injured by her seatbelt in an accident. Plaintiffs offered evidence that tended to show that defendant manufactured a product which had the potential to cause the injury and that defendant did not use alternative designs that were available and used by defendant in similar products.

Judge WYNN concurring in the result.

Appeal by Plaintiffs from judgment entered 15 May 2007 and orders entered 28 April 2008 by Judge Forrest D. Bridges in Superior Court, Mecklenburg County. Heard in the Court of Appeals 3 November 2009.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson; and Gilbert, Ollanik & Komyatte, P.C., by James L. Gilbert, for Plaintiffs-Appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Kirk G. Warner and Christopher R. Kiger; and Bowman and Brooke LLP, by Robert L. Wise and Sandra Giannone Ezell, for Defendant-Appellee.

McGEE, Judge.

Cheyenne Saleena Stark (Cheyenne), Cody Brandon Stark (Cody), and Cory Christian Stark (Cory), through their then Guardian ad Litem, Ruby Squires Stark; and Gordon Walter Stark, Jr. (Gordon Stark), filed a complaint on 23 April 2004 against Ford Motor Company (Defendant) alleging, *inter alia*, that Cheyenne suffered a spinal cord injury caused by a defective design of the seatbelt she was using during an accident involving her parents' 1998 Ford Taurus (the Taurus) on 23 April 2003. The complaint further alleged that Cody suffered "severe abdominal injuries, including damage to his spleen." The claims of Gordon Stark and Cory were later dismissed, as discussed below.

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

Cheyenne and Cody were passengers in the back seat of the Taurus on 23 April 2003. At the time of the accident, Cheyenne was five years old and Cody was nine years old. Each was secured in the Taurus by a three-point seatbelt designed by Defendant. Neither Cheyenne nor Cody was sitting in a booster seat. Their three-year-old sibling, Cory, was sitting in the middle of the back seat.

Cheyenne's mother, Tonya Stark, was driving the Taurus. Cheyenne's father, Gordon Stark, was a passenger in the front seat. Tonya Stark was operating the Taurus in a parking lot at a speed of twenty-six miles per hour, when the vehicle suddenly accelerated. She lost control of the Taurus, and it collided with a light pole.

Following the collision, Cheyenne was dazed but able to walk. However, after Cheyenne was taken to the hospital a short time later, she complained of leg pain. Cheyenne later lost all feeling in her body below her rib cage.

The complaint alleged that Defendant engaged in "[w]illful, [w]anton and [r]eckless [m]isconduct" in designing the seatbelts in the Taurus and that Defendant's actions caused physical and cognitive injuries to Cheyenne and Cody. The complaint also alleged that the engine in the Taurus was defectively designed in that it caused a "sudden unintended acceleration" which led to the collision. Defendant filed an answer generally denying negligence and defective design and asserting that Tonya Stark and Gordon Stark were the cause of any injuries. Defendant also alleged, *inter alia*, the affirmative defenses of unauthorized modification or alteration of the Taurus or its components and failure to follow instructions or warnings given by Defendant.

Defendant filed a motion for summary judgment on 17 February 2005. The trial court filed an order on 22 August 2005 granting Defendant's motion as to: (1) the claim for cognitive injury to Cheyenne, and (2) the claim based on the sudden unintended acceleration of the Taurus. In its order, the trial court also dismissed personal injury claims asserted by Gordon Stark and Cory. The trial court denied Defendant's motion for summary judgment as to the remainder of claims, finding that there remained genuine issues of material fact.

Nicole Jacobsen, (Guardian ad Litem), filed a motion on 15 March 2005 seeking to be substituted as Guardian ad Litem in the action. The record is unclear as to when this motion was granted; however, at the time of trial, plaintiffs in the action were as follows: Cheyenne

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

Saleena Stark and Cody Brandon Stark, by their Guardian ad Litem, Nicole Jacobsen (Plaintiffs).

At trial, Plaintiffs presented expert testimony that the injuries Cheyenne suffered were caused or enhanced by a design defect known as “film spool” in the seatbelt she was using. This defect allowed slack in the seatbelt to cause the shoulder portion of the belt to slip off Cheyenne’s shoulder and come to rest in a position lower on her body, such that she bent over the seatbelt during the accident. It was this “film spool” and the resulting movement by Cheyenne that Plaintiffs asserted as the cause of Cheyenne’s injuries. Plaintiffs further presented evidence that the use of certain devices may prevent “film spool” from occurring during accidents by retracting or otherwise restricting any excess belt material during a collision. The Taurus was not equipped with any of these devices.

At the close of Plaintiffs’ evidence, Defendant moved for a directed verdict on the grounds that Plaintiffs failed to present evidence of “testing to show that any of their alleged alternative designs would have made the Taurus any safer in this crash.” Defendant renewed its directed verdict motion at the close of all the evidence. The trial court denied both of Defendant’s motions.

Defendant presented evidence at trial that Cheyenne’s injuries were caused by her improper use of the seatbelt. Specifically, Defendant asserted that Cheyenne was wearing the seatbelt with the shoulder portion behind her back. Defendant argued that, because Cheyenne was not restrained by the shoulder portion of the belt, the “film spool” effect could not have been the cause of her injuries. Because “film spool” was not a cause, the use of the preventative devices offered by Plaintiffs would have made no difference as to Cheyenne’s injuries. Instead, Defendant presented three theories of causation for Cheyenne’s injuries: (1) the accident itself; (2) Cheyenne’s improper use of the seatbelt by wearing the shoulder belt behind her back; and (3) Cheyenne’s non-use of a booster seat, contrary to Defendant’s instructions.

Plaintiffs filed a motion for a directed verdict as to two of Defendant’s affirmative defenses. In their motion, Plaintiffs specifically requested a directed verdict as to Defendant’s affirmative defenses of “Alteration or Modification of Product” pursuant to N.C. Gen. Stat. § 99B-3, and “Adequate Warnings or Instruction” pursuant to N.C. Gen. Stat. § 99B-4. With respect to their requested directed verdict based on N.C.G.S. § 99B-3, Plaintiffs argued that,

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

because Tonya Stark and Gordon Stark were not parties to the action, and because Cheyenne was a minor under the age of seven years and was therefore legally incapable of negligence, N.C.G.S. § 99B-3 did not provide an affirmative defense to Defendant. After hearing arguments from Plaintiffs and Defendant, the trial court denied Plaintiffs' motion.

The trial court submitted questions to the jury. The jury answered those questions, in pertinent part, as follows:

4. Did the Defendant Ford Motor Company act unreasonably in designing the 1998 Ford Taurus and its component parts, proximately causing enhanced injury to Cheyenne Stark?

Answer: [Yes]

[If you answer "Yes" to this issue, then go to Issue 5; if you answer "no" to this issue, then do not consider any further issues.]

5. Were the enhanced injuries to Cheyenne Stark caused by using the 1998 Ford Taurus in a manner contrary to any express and adequate instructions or warnings which were known or should have been known by the user?

Answer: [No]

[If you answer "Yes" to this issue, then do not consider any further issues; if you answer "no" to this issue, go to Issue 6.]

6. Were the enhanced injuries to Cheyenne Stark caused by an alteration or modification of the 1998 Ford Taurus?

Answer: [Yes]

[If you answer "yes" [sic] to this issue, then do not consider any further issue; if you answer "no" to this issue, then go to Issue 7.]

The jury further determined that Defendant's product, the Taurus, was not the proximate cause of enhanced injury to Cody. The trial court entered judgment in favor of Defendant on 15 May 2007, ordering that Plaintiffs recover nothing from Defendant, dismissing Plaintiffs' complaint, and awarding costs to Defendant. The trial court retained jurisdiction for the purposes of determining costs and expert witness fees.

Plaintiffs filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial on 24 May 2007. The trial court filed an order denying Plaintiffs' motion on 23 April 2008.

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

Defendant filed a motion for costs in the amount of \$135,634.74 on 8 August 2007 on the grounds of “its successful defense and jury verdict”. In an order entered 28 April 2008, the trial court granted Defendant’s motion in part but reduced the award to \$45,717.92. The trial court stated that “after consideration of the motion, affidavits, materials submitted by the parties, arguments of counsel, and other matters of record, that [Defendant] was the prevailing party at trial and that certain costs should, in the [c]ourt’s discretion, be awarded to [Defendant].” The trial court awarded these costs “against Plaintiffs and Nicole Jacobsen as Guardian ad Litem, jointly and severally[.]”

Plaintiffs appeal from the trial court’s judgment entered 15 May 2007, the trial court’s order denying Plaintiffs’ motion for judgment notwithstanding the verdict or a new trial, and the trial court’s order granting Defendant’s motion for award of costs. Defendant cross-assigns error and argues that the trial court erred in denying Defendant’s motions for summary judgment and directed verdict as to Plaintiffs’ inadequate design claims.

Directed Verdict

[1] Plaintiffs first argue that the trial court erred by denying their motion for a directed verdict on the issue of product alteration. Because Cheyenne was five years old at the time of the collision, Plaintiffs contend she was legally incapable of modifying or altering the product under N.C. Gen. Stat. § 99B-3. Because neither Tonya Stark nor Gordon Stark was a party to this action, Plaintiffs contend that no misuse or modification on their part would provide a defense under N.C.G.S. § 99B-3. Plaintiffs argue, therefore, that the trial court should have granted a directed verdict as to Defendant’s § N.C.G.S. 99B-3 defense as described in jury question number 6, to wit: whether “the enhanced injuries to Cheyenne Stark [were] caused by an alteration or modification of the 1998 Ford Taurus[.]” We agree.

Our Court reviews a trial court’s ruling on a motion for directed verdict *de novo*. *Denson v. Richmond County*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003).

The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury. Where the motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for directed verdict, this Court has required the use of the same standard of sufficiency of evidence in reviewing both motions.

Davis v. Dennis Lilly Co., 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (internal citations omitted). Where a trial court errs in submitting an affirmative defense to a jury, our Court has the discretion to remand for a new trial. *Cicogna v. Holder*, 345 N.C. 488, 490, 480 S.E.2d 636, 637 (1997). However, "[i]f the issue which was erroneously submitted did not affect the entire verdict, there should not be a new trial on all issues." *Id.*

N.C. Gen. Stat. §§ 99B-1 *et seq.*, which govern products liability actions in North Carolina, provide a defense to a products liability claim in N.C. Gen. Stat. § 99B-3, as follows:

(a) No manufacturer or seller of a product shall be held liable in any product liability action where a proximate cause of the personal injury, death, or damage to property was either an alteration or modification of the product by a party other than the manufacturer or seller, which alteration or modification occurred after the product left the control of such manufacturer or such seller unless:

(1) The alteration or modification was in accordance with the instructions or specifications of such manufacturer or such seller; or

(2) The alteration or modification was made with the express consent of such manufacturer or such seller.

(b) For the purposes of this section, alteration or modification includes changes in the design, formula, function, or use of the product from that originally designed, tested, or intended by the manufacturer. It includes failure to observe routine care and maintenance, but does not include ordinary wear and tear.

N.C. Gen. Stat. § 99B-3 (2009).

Our Court has held that a determination of whether an act was a proximate cause of an injury must include an analysis of "foreseeability." *Hastings for Pratt v. Seegars Fence Co.*, 128 N.C. App. 166,

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

170, 493 S.E.2d 782, 785 (1997). Because the alteration or modification of a product must be a proximate cause of an injury in order to provide a viable defense under N.C.G.S. § 99B-3, we must analyze the issue of foreseeability. *Id.*, 493 S.E.2d at 784.

Foreseeability of some injurious consequence of one's act is an essential element of proximate cause, though anticipation of the particular consequence is not required. While the usual test is whether "a person of ordinary prudence could have reasonably foreseen . . ." some injurious result from the unintended use of the product; where, as in the present case, the actions of a minor child are at issue, the test of foreseeability is whether a child of similar "age, capacity, discretion, knowledge, and experience" could have foreseen some injurious result from his or her use of the product.

Id., 493 S.E.2d at 785 (internal citations omitted). "As a matter of law, a child under 7 years of age is incapable of negligence." *State v. Harrington*, 260 N.C. 663, 666, 133 S.E.2d 452, 455 (1963). *See also Allen v. Equity & Investors Management Corp.*, 56 N.C. App. 706, 709, 289 S.E.2d 623, 625 (1982) ("An infant under 7 years of age is conclusively presumed to be incapable of contributory negligence.") (citation omitted).

Plaintiffs argue that, because Cheyenne was under seven years of age at the time of the accident, she was incapable of negligence and was therefore unable to "foresee" that any modification or alteration could be a proximate cause of her injury. We agree.

In *Hastings*, our Court held that N.C.G.S. § 99B-3 did not provide a defense to a manufacturer on the following facts. An eight-year-old child was injured while playing on a fence and gate constructed by the defendant. *Hastings*, 128 N.C. App. at 167, 493 S.E.2d at 783. While the minor plaintiff was hanging on the gate, another child caused the gate to roll. *Id.* When the gate rolled, two of the minor plaintiff's fingers were caught in a roller and were amputated. *Id.* The minor plaintiff's mother, as guardian ad litem for the child, filed a negligence action against the gate manufacturer. *Id.* The defendant argued that N.C.G.S. § 99B-3 provided a defense to the plaintiff's claim in that the minor child "used the fence in a manner other than as it was originally designed, tested, or intended by the manufacturer to be used[.]" *Id.* at 169, 493 S.E.2d at 784. The trial court eventually dismissed the plaintiff's claims. *Id.* at 168, 493 S.E.2d at 783.

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

Our Court held that the defendant's allegation of "the minor plaintiff's contributory negligence 'by engaging in horseplay on the fence and cantilevered gate . . . ' was sufficient to raise the defense provided by G.S. § 99B-3[.]" *Id.* at 169, 493 S.E.2d at 784. We then cited the standard of care applicable to a minor child between the ages of seven and fourteen years and held that "[i]ssues of proximate cause and foreseeability, involving application of standards of conduct, are ordinarily best left for resolution by a jury under appropriate instructions from the court." *Id.* at 170, 493 S.E.2d at 785.

We apply the same principles of negligence to the N.C.G.S. § 99B-3 analysis in the present case. While the minor plaintiff in *Hastings* was eight years old, in the case before us, Cheyenne was five years old and therefore subject to a different standard of care. As discussed above, the appropriate standard of care to apply, when analyzing the negligence of a child under seven years of age, is that such children are, as a matter of law, incapable of negligence. *Harrington*, 260 N.C. at 666, 133 S.E.2d at 455. Therefore, because Cheyenne was a child under seven years of age at the time of the alleged alteration or modification, Defendant is unable, as a matter of law, to prove the requisite element of foreseeability inherent in the proximate cause portion of its N.C.G.S. § 99B-3 defense. Because foreseeability, and therefore proximate cause, is lacking in Defendant's defense as to Cheyenne, N.C.G.S. § 99B-3 is inapplicable to any alteration or modification alleged to have been performed by Cheyenne herself.

Party Modifier

[2] Plaintiff next addresses Defendant's argument that Gordon Stark or Tonya Stark modified the seatbelt by improperly placing Cheyenne in the seat with the shoulder belt behind her back. Plaintiffs argue that Cheyenne was still entitled to a directed verdict because neither Gordon Stark nor Tonya Stark was "a party" to the action, as required by N.C. Gen. Stat. § 99B-3.

N.C.G.S. § 99B-3 provides in pertinent part that:

No manufacturer or seller of a product shall be held liable in any product liability action where a proximate cause of the personal injury, death, or damage to property was either an alteration or modification of the product by *a party* other than the manufacturer or seller, which alteration or modification occurred after the product left the control of such manufacturer or such seller. . . .

N.C.G.S. § 99B-3 (emphasis added).

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

Defendant argues that the trial court's judgment, based on the jury's verdict, was supported by evidence that Gordon Stark misused the rear seatbelt by putting Cheyenne in the backseat and buckling her seatbelt with the shoulder belt behind her back. Defending against Plaintiffs' motion for directed verdict, Defendant argued at trial that "[m]ore importantly, what is the specific evidence in this case about who used Cheyenne Stark's belt; Gordon Stark. He put her in that belt on that day. He is the one who affixed her to this vehicle. He's the one who used the product." Plaintiffs argue that N.C.G.S. § 99B-3 is inapplicable to any alleged alterations or modifications performed by either Tonya Stark or Gordon Stark in placing Cheyenne in the seatbelt improperly, because neither Tonya Stark nor Gordon Stark is a party to this action.

At the time of trial, neither Tonya Stark nor Gordon Stark were parties to the action. Gordon Stark, originally a named plaintiff, had his personal injury claims dismissed on 22 August 2006 when the trial court granted Defendant's motion for summary judgment. Defendant filed a motion for leave to file a third-party complaint against Tonya Stark and Gordon Stark as third-party defendants on 21 August 2006. Defendant's motion was granted in an order filed 27 October 2006, with the condition that, "if the third party defendants are unable to obtain counsel who can prepare for and participate in the trial scheduled for October 30, 2006, then . . . the third party action shall be SEVERED from the instant action and tried at a later date." Defendant did not file a third-party complaint naming as third-party defendants Tonya Stark and Gordon Stark until January 2007. At the time of trial, the parties were as follows: Cheyenne and Cody, by their guardian ad litem, Nicole Jacobsen, as plaintiffs, and Ford Motor Company as defendant.

Plaintiffs rely on three cases involving the application of N.C.G.S. § 99B-3, contending that "[i]n all three cases, the 'modifier' was, or may have been, a party-defendant in the suit, and the cases do not address modification by a non-party as a defense." These cases are: *Edmondson v. Macclesfield L-P Gas Co., Inc.*, 182 N.C. App. 381, 642 S.E.2d 265 (2007); *Phillips v. Restaurant Management*, 146 N.C. App. 203, 552 S.E.2d 686 (2001); and *Rich v. Shaw*, 98 N.C. App. 489, 391 S.E.2d 220 (1990). We note that in *Phillips*, the plaintiff named three defendants in their action: a restaurant management company, Taco Bell Corp., and a restaurant employee. *Phillips*, 146 N.C. App. at 207, 552 S.E.2d at 689. The plaintiff sought to pursue a claim under Chapter 99B, and we held that he was precluded from pursuing this

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

claim by N.C.G.S. § 99B-3 on the grounds that the product, a fast food item, was produced by the management company and Taco Bell and was modified when the defendant-employee spit into it. *Phillips*, 146 N.C. App. at 218-19, 552 S.E.2d at 696. Therefore, the modifier in *Phillips* was a party to the action.

Likewise, in *Edmondson*, the plaintiff filed an action against both the manufacturer of a heater and a company that performed a “negligent repair” on that heater. 182 N.C. App. at 386, 642 S.E.2d at 269. Our Court upheld the trial court’s ruling that the manufacturer was protected by the N.C.G.S. § 99B-3 defense on grounds that the heater had been improperly modified for use with liquified petroleum gas after it left the manufacturer’s control. *Id.* at 389-90, 642 S.E.2d at 271-72. The opinion is unclear on the issue of whether the modifier was a party to the action, but Plaintiffs filed a motion requesting that we take judicial notice of a portion of the defendant manufacturer’s brief filed with our Court in *Edmondson* referring to the modifier as a party. We grant that motion and take judicial notice of the following statement: “the subject heater was sold . . . and left [defendant manufacturer’s] possession, but before it was installed at [the plaintiff’s] residence, it was modified by [the defendant repair company] so that it could be used with Liquified Petroleum (L-P) Gas instead of Natural Gas.” *See Whitmire v. Cooper*, 153 N.C. App. 730, 735, 570 S.E.2d 908, 911 n.4 (2002) (“this [C]ourt may take judicial notice of the public records of other courts within the state judicial system”) (citation omitted); *see also State v. Benfield*, 76 N.C. App. 453, 459, 333 S.E.2d 753, 757 n.1 (1985) (our Court taking judicial notice of “the records of this Court”). Therefore, the modifier in *Edmonson* was also a party to the action.

Defendant counters that this Court did not address whether the “modifier” was a party to the action in any of the three cases cited by Plaintiffs, because “the [N.C.G.S. § 99B-3] defense does not require it.” We note that in *Rich*, the third case upon which Plaintiffs rely, the opinion is unclear whether the modification was performed by a party or not. *See Rich*, 98 N.C. App. 489, 391 S.E.2d 220. However, the argument concerning the application of the defense in *Rich* did not turn, as here, on the requirement that the modifier be a party. *See Id.*, 98 N.C. App. at 492, 391 S.E.2d at 222-23. This issue appears to have not been previously determined by our Courts. Defendant contends that the defense enumerated under N.C.G.S. § 99B-3 “is concerned only with whether the product was used properly and whether someone ‘other than the manufacturer’ altered or misused the product.”

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

Defendant's argument overlooks the plain language of the statute. The statute does not provide a defense where "someone 'other than the manufacturer' altered or misused the product[.]" as Defendant contends. Rather, N.C.G.S. § 99B-3 provides a defense where "*a party* other than the manufacturer or seller" causes the alteration or modification. N.C.G.S. § 99B-3 (emphasis added).

To the extent that Defendant contends the use of the term "party" in N.C.G.S. § 99B-3 is unclear, we note that in N.C. Gen. Stat. § 99B-1, which provides the definitions for terms used in Chapter 99B, the terms "Claimant[.]" "Manufacturer[.]" and "Seller" are defined using the phrases "a person or other entity[.]" "a person or entity[.]" and "any individual or entity[.]" respectively. N.C. Gen. Stat. § 99B-1 (2009). Had the General Assembly intended N.C.G.S. § 99B-3 to apply to any person, individual or entity, it would have used such terms. *See Fabrikant v. Currituck County*, 174 N.C. App. 30, 42-43, 621 S.E.2d 19, 28 (2005) (citing *Russello v. United States*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 24 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.")). Instead, in the statute before us, the General Assembly used the term "party," which has independent legal significance. We note that "party" is defined as "[o]ne who takes part in a transaction . . . [or] [o]ne by or against whom a lawsuit is brought[.]" Black's Law Dictionary 1231-32 (9th ed. 2009). Therefore, the plain language of N.C.G.S. § 99B-3 states that the entity responsible for the modification or alteration of the product must be a party to the action in order for the defense to apply. Because Defendant asserts that the modification was performed by Gordon Stark, who is not a party to the action in this case, Defendant is unable to establish an N.C.G.S. § 99B-3 defense as to such an alleged modification.

As discussed above, a directed verdict is proper when the evidence, viewed in the light most favorable to the non-moving party, is insufficient, as a matter of law, to submit the question to the jury. *Davis*, 330 N.C. at 322-23, 411 S.E.2d at 138. Because Defendant is unable, as a matter of law, to support an N.C.G.S. § 99B-3 defense as to either Cheyenne, Tonya Stark, or Gordon Stark, Plaintiffs are entitled to a directed verdict as to Defendant's N.C.G.S. § 99B-3 defense. We therefore reverse the trial court's order denying Plaintiffs' motion for directed verdict as to Defendant's N.C.G.S. § 99B-3 defense.

In light of our holding, we need not address Plaintiffs' arguments concerning judgment notwithstanding the verdict, entry of judgment,

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

or motion for a new trial. Because the jury found that Defendant “act[ed] unreasonably in designing the 1998 Ford Taurus and its component parts, proximately causing enhanced injury to Cheyenne Stark,” we reverse the trial court’s judgment and remand for entry of judgment in favor of Cheyenne Stark and for a trial on the issue of damages. *Cicogna*, 345 N.C. at 490, 480 S.E.2d at 637.

Costs

[3] Plaintiffs next argue that the trial court erred in awarding court costs against the Guardian ad Litem individually. Because we reverse the trial court’s judgment, we vacate the trial court’s order awarding costs in favor of Defendant. *See* N.C. Gen. Stat. § 6-1 (2009) (“To the party for whom judgment is given, costs shall be allowed[.]”).

Defendant’s Cross-Assignments of Error

[4] Defendant argues that the trial court erred by denying its motions for summary judgment and directed verdict. We disagree. As discussed above, a directed verdict is proper when the evidence, viewed in the light most favorable to the non-moving party, is insufficient as a matter of law to submit the question to the jury. *Davis*, 330 N.C. at 322-23, 411 S.E.2d at 138. Summary judgment is proper where, taking the evidence in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 665-66, 449 S.E.2d 240, 242 (1994).

Defendant cites N.C. Gen. Stat. § 99B-6 and argues that North Carolina’s products liability act requires Plaintiffs to show, *inter alia*, that Defendant failed to “adopt a ‘safer, practical, feasible, and otherwise reasonable alternative design’ that would have prevented or minimized [Cheyenne’s] injuries, [or that] the Taurus’s design was ‘so unreasonable that a reasonable person, aware of the relevant facts, would not use or consume a product of this design.’” Defendant specifically argues that Plaintiffs’ expert testimony regarding alternative designs “lacked any methodologically-sound support” because the experts cited to no testing to support their conclusions. However, Defendant cites no authority to support its contention that Plaintiffs’ evidence was insufficient, nor that expert witness testimony of this nature required “testing” in order to withstand a directed verdict.

N.C. Gen. Stat. § 99B-6 provides in pertinent part:

- (a) No manufacturer of a product shall be held liable in any product liability action for the inadequate design or formulation of the

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

product unless the claimant proves that at the time of its manufacture the manufacturer acted unreasonably in designing or formulating the product, that this conduct was a proximate cause of the harm for which damages are sought, and also proves one of the following:

(1) At the time the product left the control of the manufacturer, the manufacturer unreasonably failed to adopt a safer, practical, feasible, and otherwise reasonable alternative design or formulation that could then have been reasonably adopted and that would have prevented or substantially reduced the risk of harm without substantially impairing the usefulness, practicality, or desirability of the product.

(2) At the time the product left the control of the manufacturer, the design or formulation of the product was so unreasonable that a reasonable person, aware of the relevant facts, would not use or consume a product of this design.

(b) In determining whether the manufacturer acted unreasonably under subsection (a) of this section, the factors to be considered shall include, but are not limited to, the following:

(1) The nature and magnitude of the risks of harm associated with the design or formulation in light of the intended and reasonably foreseeable uses, modifications, or alterations of the product.

...

(6) The technical, economic, and practical feasibility of using an alternative design or formulation at the time of manufacture.

(7) The nature and magnitude of any foreseeable risks associated with the alternative design or formulation.

N.C. Gen. Stat. § 99B-6 (2009).

Plaintiffs counter by pointing out the weight of evidence offered at trial that supported their claims. Plaintiffs presented, *inter alia*, the testimony of Dr. Joseph Burton, a forensic pathologist. Dr. Burton testified that, based on the damage to the vehicle, he would have expected the passengers to suffer injuries, but not “catastrophic injury Maybe just a broken wrist.” Dr. Burton further testified that Cheyenne was paralyzed from the accident because her shoulder belt was not snug and had “slack in it[,]” causing the belt to “snap-load[] the chest for her to have this injury.”

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

Dr. Burton further testified that the injuries suffered by Cheyenne were the result of a process called “film spool.” When “film spool” occurs, excess webbing material in a seatbelt continues to extend after the spool to which the material is secured ceases to move. The use of certain devices may prevent “film spool” from occurring during accidents by retracting, or otherwise restricting, any excess belt material during a crash. He testified that though these devices were available when the Taurus was manufactured and were, in fact, used by Defendant in certain of its products sold outside of the United States, none of these devices was present in the Taurus involved in the collision that caused Cheyenne’s injuries.

Plaintiffs therefore offered evidence that, when viewed in the light most favorable to Plaintiffs, tended to show that Defendant manufactured a product which had the potential to cause the injury suffered by Cheyenne. Though there were alternative designs available at the time which were used by Defendant in similar products, the product used by Plaintiffs did not include these alternative designs. We hold that Plaintiffs presented sufficient evidence to survive Defendant’s motions for summary judgment and directed verdict. Defendant’s cross-assignments of error are therefore overruled.

Reversed in part, vacated in part, and remanded.

Judge BRYANT concurs.

Judge WYNN concurs in the result with a separate opinion.

WYNN, Judge concurring in the result.

I write separately to emphasize that judicial restraint guides our interpretation of the affirmative defense to product liability codified in N.C.G.S. § 99B-3 (“the modification defense”). Here, the language of the statute is clear and we are duty-bound to follow the law as written. Nonetheless, while I concur with the majority in following the clear language of the statute, I do so mindful that the statutory language appears inconsistent with general principles of negligence, modification defenses in all other states, and *possibly* even the intent of our legislature itself.

To begin, it warrants mention that Plaintiff’s claims are based on Defendant’s alleged negligence in the design of the Ford Taurus. It is a well-established principle in negligence cases that the plaintiff can-

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

not prevail “[w]hen it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person.” *Smith v. Sink*, 211 N.C. 725, 727, 192 S.E. 108, 109 (1937). It does not matter if the “responsible third person” is a party to the action; what matters is that the person’s actions constitute intervening negligence insulating the defendant from liability. The fact that the case *sub judice* is a products liability action should not, without more, mean that intervening negligence is only given legal effect when the person who proximately caused the plaintiff’s injury is a party to the suit. Indeed, this Court has stated that “[i]n an action to recover for injuries resulting from the negligence of a manufacturer, plaintiff must present evidence which tends to show that the product manufactured by defendant was defective *at the time it left defendant’s plant*, and that defendant was negligent in its design of the product, in its selection of materials, in its assembly process, or in its inspection of the product.” *Jolley v. General Motors Corp.*, 55 N.C. App. 383, 385, 285 S.E.2d 301, 303 (1982) (emphasis added) (citing *Cockerham v. Ward*, 44 N.C. App. 615, 262 S.E.2d 651, *disc. rev. denied*, 300 N.C. 195, 269 S.E.2d 622 (1980)).

The common sense corollary is that when a product is modified after “the time it left defendant’s plant” the defendant is insulated from claims of negligent design, regardless of whether the modifier is a party to the action. Indeed, at first blush it seems illogical to subject a manufacturer to liability for injuries resulting from a modified product potentially quite different from that initially placed into the stream of commerce solely on the grounds that the modifier had not been joined in the action. However, “[i]n interpreting statutes, . . . it is always presumed that the Legislature acted with full knowledge of prior and existing law.” *Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977). Thus, in light of the fact that N.C.G.S. § 99B-3 directly addresses the affirmative defense of product modification in products liability actions, I concede that the language therein must control this Court’s decision.

Nonetheless, it is troubling that strict adherence to the statutory language regarding modification defense represents so dramatic a departure from the view held in all other states regarding the legal effect of product modification on the liability of manufacturers. While a number of other states recognize a defense to such liability when the product has been modified, none limit the defense to apply only when modification was performed by a party to the litigation.

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

Some of the statutes in other states explicitly allow for a defense when anyone other than the manufacturer or seller modifies the product. For example, Indiana provides a defense in a products liability action when the product is modified or altered “by any person after the product’s delivery to the initial user or consumer . . .” Ind. Code § 34-20-6-5 (LexisNexis 2008). Similarly, in Kentucky a modification defense to products liability applies “to alterations or modifications made by any person or entity, except those made in accordance with specifications or instructions furnished by the manufacturer.” Ky. Rev. Stat. Ann. § 411.320 (West 2006); *see also Smith v. Louis Berkman Co.*, 894 F.Supp. 1084, 1090 (W.D. Ky. 1995) (“KRS 411.320 indicates the Kentucky legislature’s intent to benefit product manufacturers by precluding their tort liability when their products are modified or altered by someone else.”).

Other statutes fail to even mention the identity of the modifier. In Michigan, “[a] manufacturer or seller is not liable in a product liability action for harm caused by an alteration of the product unless the alteration was reasonably foreseeable.” Mich. Comp. Laws § 600.2947(1) (2000). In North Dakota, the modification defense applies when the alteration or modification “occurred subsequent to the sale by the manufacturer or seller to the initial user or consumer.” N.D. Cent. Code § 28-01.3-03 (2006).

Finally, there are state statutes which provide a modification defense as long as the manufacturer/seller is not responsible for the modification. For example, the Idaho statute defines the type of alteration or modification giving rise to a defense in a products liability action as that which “occurs when a person or entity other than the product seller changes the design, construction, or formula of the product, or changes or removes warnings or instructions that accompanied or were displayed on the product.” Idaho Code Ann. § 6-1405(4)(a) (2004).

In sum, after reviewing products liability statutes in states other than North Carolina, it appears that the clear language under our statute, N.C.G.S. § 99B-3, creates within our borders a unique legal regime with respect to products liability. However, I recognize and respect the fact that “[t]he decisions from other jurisdictions, while helpful in construing the provisions of our statute, are not controlling; neither is the interpretation placed upon a statute similar to ours, binding on this Court.” *Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 266, 22 S.E.2d 570, 576 (1942).

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

I also respect the principle that “[w]hen the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.” *Diaz v. Division of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citation omitted). Here, I agree with the majority that the legislature’s use of the word “party” renders the language of the statute clear and unambiguous. I further note that even if the language were “ambiguous,” there is no definitive proof in the legislative history of N.C.G.S. § 99B-3 that the General Assembly intended to apply a contrary meaning to the word “party.” *See id.* (“[W]hen the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.”).

On 29 January 1979, Senate Bill 189 was introduced in the N.C. Senate. This bill, which was the first attempt in that legislative session to pass products liability reform, stated:

No manufacturer or seller of a product shall be held liable in any product liability action where a contributing cause of the injury, death or damage to property was either (a) an alteration or modification of the product which occurred after the product left the control of the manufacturer or seller, or (b) a use of the product in a manner for which the product was not originally designed, manufactured, recommended or warranted.

S.B. 189, 1979 Gen. Assem., Reg. Sess. (N.C. 1979). Notably, this initial conception of the modification defense focused on the time when modification took place (i.e. after the product left the control of the manufacturer) rather than the identity of the modifier.

On the same day that Senate Bill 189 was introduced, House Bill 235 was introduced with the exact same language. On 28 February 1979, a joint public hearing of the committees considering Senate Bill 189 and House Bill 235 met to discuss the proposed legislation. There was no mention at this joint public hearing about limiting the modification defense to modifiers that were parties in the products liability action.

Indeed, the first reference to the identity of the modifiers was added on 8 March 1979 when Senate Bill 189 was amended to read

No manufacturer or seller of a product shall be held liable in any product liability action where a contributing cause of the injury, death or damage to property was either (a) an alteration or mod-

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

ification of the product which occurred after the product left the control of such manufacturer or such seller *if the alteration or modification was not done by the manufacturer or seller*, or (b) a use of the product in a manner for which the product was not originally designed, manufactured, recommended or warranted.

S.B. 189, 1979 Gen. Assem., Reg. Sess. (N.C. 1979) (as amended 8 Mar. 1979) (emphasis added). This amendment limited the defense to modifications made by someone other than the manufacturer or seller, but again did not indicate that the modifier must be a party to the case.¹

On 30 March 1979, Representative Martin Lancaster introduced House Bill 993 as a proposed alternative to Senate Bill 189. House Bill 993 was, according to Rep. Lancaster, the Uniform Products Liability Bill prepared by the U.S. Department of Commerce. Rep. Lancaster stated “[t]he Senate Bill provides that the manufacturer or seller of a product is not liable when the injury is the result of an alteration or modification of the product which occurred after the product left their hands. My Bill will provide that same protection.” *Hearing on H.R. 993 Before H. Judiciary II Comm.*, 1979 Gen. Assem., Reg. Sess. (N.C. 1979) (statement of Rep. Martin Lancaster, Member, Judiciary II Comm.). Again, there was no indication that the availability of such protection depended on whether the modifier was a party to the case.

House Bill 993 was the first draft of products liability legislation to include the word “party” but it did so as follows:

A product seller shall not be liable for harm that would not have occurred but for the fact that his product was altered or modified by a *third party* unless:

- (1) the alteration or modification was in accordance with the product seller’s instructions or specifications;
- (2) the alteration or modification was made with the express consent of the product seller; or
- (3) the alteration or modification was the result of conduct that reasonably should have been anticipated by the product seller.

H.R. 993, 1979 Gen. Assem., Reg. Sess. (N.C. 1979) (emphasis added).

1. A subsequent amendment, adopted on 15 March 1979, clarified that for the modification defense to apply the modification must have been a proximate cause of the injury. S.B. 189, 1979 Gen. Assem., Reg. Sess. (N.C. 1979) (as amended 15 Mar. 1979).

STARK v. FORD MOTOR CO.

[204 N.C. App. 1 (2010)]

The three proposed bills concerning products liability (House Bill 235, House Bill 993, and Senate Bill 189) were referred to a special study subcommittee of the House Judiciary II Committee. The subcommittee drafted a proposed Committee substitute and this House Substitute bill was given a favorable report. This House Committee substitute bill is the first one that introduced the “by a party other than the manufacturer or seller” language. Ultimately, this language was retained in N.C.G.S. § 99B-3.

My research reveals no indication as to why the members of the special study subcommittee of the House Judiciary II Committee chose to add language to the statute. This is disconcerting in light of the fact that all of the previous versions of the modification defense seem to envision broad protection for modifiers whose products were modified, regardless of whether the modifier was a party to the suit, as long as the modification occurred after the product left the manufacturer’s control. However, basic rules of statutory construction dictate that our legislature does not intend *sub silentio* to enact statutory language that it has replaced with other words or phrases. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43, 94 L. Ed. 2d 434, 454 (1987) (citation omitted).

Furthermore, “the General Assembly is presumed to have acted advisedly and with a knowledge of the meaning of language . . . and it will never be assumed, if any other conclusion is permissible, that it has done a vain and foolish thing” *Bank v. Loven*, 172 N.C. 666, 670-71, 90 S.E. 948, 950 (1916) (internal citation omitted). Therefore, we are constrained to hold that the language of the modification defense as written limits its availability to situations in which the modifier is a party to the litigation.

It is worthwhile to query whether the burden of the legislature’s limitation of the modification defense to “parties” could have been mitigated by adding Tonya and Gordon Stark as new parties in this case. The North Carolina Rules of Civil Procedure permit a defending party to implead a new party “who is or may be liable to him for all or part of the plaintiff’s claim against him.” N.C. Gen. Stat. § 1A-1, Rule 14(a) (2009). As such, Rule 14 allows impleader when the third-party defendant may be liable to the original defendant for contribution or indemnification. *Spearman v. Pender Cty. Bd. of Educ.*, 175 N.C. App. 410, 412, 623 S.E.2d 331, 333 (2006). Furthermore, “[i]t is not necessary that the third-party defendant’s liability be previously determined.” *Rouse v. Maxwell*, 40 N.C. App. 538, 543, 253 S.E.2d 326, 329, *appeal dismissed*, 298 N.C. 570, 261 S.E.2d 124 (1979).

MIDKIFF v. COMPTON

[204 N.C. App. 21 (2010)]

Indeed, in the instant case, Defendant was granted leave to file a third-party complaint seeking indemnification or, in the alternative, contribution from Tonya and Gordon Stark. The trial court granted this motion and subsequently ordered the severance of the third-party suit from the principal action to avoid delaying the trial in the latter. Although this severance ultimately rendered the modification defense unavailable to Defendant, Defendant did not argue on appeal that the severance was error, and as such that issue is not before the Court.

In conclusion, because the language of the statute is clear, I agree with its application in this case. If in fact the legislature intended the modification defense to apply when the modifier is not a party to the products liability action, it can revisit the issue and amend the statute. As written, however, the language is subject to only its plain and ordinary interpretation, which comports with that of the majority.

AUDREY ANNE MIDKIFF, PLAINTIFF-APPELLANT v. JOHN MICHAEL COMPTON,
DEFENDANT-APPELLEE

No. COA09-254

(Filed 18 May 2010)

1. Appeal and Error— interlocutory order and appeal—discovery—physician-patient privilege—substantial right

Although ordinarily discovery orders are not subject to immediate appeal, plaintiff's claim affected a substantial right and was immediately appealable because plaintiff was ordered to disclose matters she asserted were protected by the physician-patient privilege.

2. Discovery— motion to compel—medical records—physician-patient privilege

The trial court did not abuse its discretion in a personal injuries case arising out of an automobile accident by granting defendant's motion to compel discovery. Plaintiff impliedly waived her physician-patient privilege as to medical records causally or historically related to her "great pain of body and mind."

Judge STEELMAN concurring in result in separate opinion.

MIDKIFF v. COMPTON

[204 N.C. App. 21 (2010)]

Appeal by Plaintiff from order entered 27 October 2008 by Judge Jack W. Jenkins in Superior Court, Carteret County. Heard in the Court of Appeals 30 September 2009.

Wheatly, Wheatly, Weeks & Lupton, P.A., by Christopher L. Beacham and Stevenson L. Weeks, for Plaintiff-Appellant.

Hall, Rodgers, Gaylord, & Millikan, PLLC, by Dwight G. Rodgers, Jr. and Kathleen M. Millikan, for Defendant-Appellee.

McGEE, Judge.

Audrey Anne Midkiff (Plaintiff) filed a complaint on 17 April 2008, seeking to recover damages for personal injuries she sustained when she was struck by a vehicle driven by John Michael Compton (Defendant). Plaintiff alleged that, while she was jogging on the shoulder of Little Deep Creek Road in Newport on or about 25 November 2006, Defendant's vehicle ran off the pavement and struck her, running over her right foot and injuring her lower leg, foot, and ankle. Plaintiff alleged that Defendant was negligent in causing the injuries cited above, which resulted in "great pain of body and mind."

Defendant filed an answer in which he admitted he drove his vehicle off the road but denied liability and alleged contributory negligence on the part of Plaintiff. Defendant served Plaintiff with interrogatories and requests for production of documents on 17 June 2008 requesting, *inter alia*:

1. The office records of each physician or other health care provider consulted by Plaintiff within the last ten (10) years, including without limitation any chiropractors or ancillary health care providers consulted during such period.
- ...
3. The admission and discharge summary for each hospitalization of Plaintiff within the last ten (10) years.

Plaintiff objected to Defendant's first and third request for production of documents on the grounds that they were "unduly broad, overly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in that [they sought] medical records pertaining to parts of [Plaintiff's] body not injured in the subject collision." Plaintiff further asserted that the information sought was protected by the physician-patient privilege set forth under N.C. Gen. Stat. § 8-53 (2009). Without waiving the foregoing objection, Plaintiff

MIDKIFF v. COMPTON

[204 N.C. App. 21 (2010)]

provided three exhibits containing Plaintiff's medical records from Carteret General Hospital, Carteret Surgical Associates, and Carteret Foot & Ankle, which Plaintiff deemed related to the injuries alleged in her complaint.

Defendant filed a motion to dismiss Plaintiff's complaint, or in the alternative to compel discovery, on 11 September 2008. Through his motion, Defendant sought to compel discovery of all of Plaintiff's medical records for the past ten years, pursuant to Defendant's first and third discovery requests. Plaintiff filed a motion for a protective order on 16 September 2008. In the motion, Plaintiff sought to prevent discovery of the medical records in question, or in the alternative, request that the trial court review the records *in camera* to make a determination of which records were relevant to Plaintiff's claim and were, therefore, discoverable.

The trial court held a hearing on 29 September 2008 regarding the motions. At the hearing, Defendant argued that Plaintiff had waived her physician-patient privilege with respect to her entire medical history by filing lawsuit and "[bringing] her medical past into this arena." Defendant did not know what information could be found in the medical records sought but asserted the records were necessary to the preparation of his defense. The trial court indicated a reluctance to conduct an *in camera* review because the judge presiding at the eventual trial of the case would be in a better position to make the necessary determinations regarding relevance of the documents.

The trial court entered an order on 27 October 2008 ordering, *inter alia*:

1. That Defendants' [sic] Motion to Dismiss is DENIED;
2. That Defendants' [sic] Motion to Compel Discovery is ALLOWED and that the Plaintiff shall furnish Plaintiff's medical records from each medical provider seen by her for a period of five (5) years preceding the filing of this action and that said records shall be furnished to Defendants [sic] within 30 days of entry of this Order;
3. That Plaintiff's Motion for a Protective order is ALLOWED and that the release of Plaintiff's medical records shall be limited to Defendant's attorneys and their staff; and
4. That Plaintiff's Motion to Compel Discovery is DENIED.

Plaintiff appeals.

MIDKIFF v. COMPTON

[204 N.C. App. 21 (2010)]

Timeliness of Appeal

[1] We first address the issue of whether this appeal is properly before us. Ordinarily, discovery orders are interlocutory and are not subject to immediate appeal. *Mims v. Wright*, 157 N.C. App. 339, 341, 578 S.E.2d 606, 608 (2003). Orders that are interlocutory are subject to immediate appeal when they affect a substantial right of a party. *Id.* “[W]hen, as here, a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right. . . .” *Id.* (quoting *Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999)). Because the trial court in the present case ordered Plaintiff to disclose matters she had asserted were protected by the physician-patient privilege, the trial court’s order is immediately appealable and is properly before us. *See id.* (holding that appeal from a discovery order compelling disclosure of records to which physician-patient privilege had been asserted affected a substantial right and was, therefore, immediately appealable); *see also*, *Sharpe v. Worland*, 351 N.C. at 166, 522 S.E.2d at 581; *Lockwood v. McCaskill*, 261 N.C. 754, 757, 136 S.E.2d 67, 69 (1964) (“If and when Dr. Wright is required to testify concerning privileged matters at a deposition hearing, *eo instante* the statutory privilege is destroyed. This fact precludes dismissal of the appeal as fragmentary and premature.”).

Standard of Review

When reviewing a trial court’s ruling on a discovery issue, our Court reviews the order of the trial court for an abuse of discretion. *Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 737, 294 S.E.2d 386, 388 (1982) (noting that ordinarily, orders relating to discovery are addressed to the discretion of the trial court and are to be reviewed for abuse of discretion). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Privilege

[2] Plaintiff first argues that the trial court abused its discretion by granting Defendant’s motion to compel discovery because the documents sought were protected by physician-patient privilege. We disagree.

MIDKIFF v. COMPTON

[204 N.C. App. 21 (2010)]

As a preliminary matter, we stress that, while the two are related, a determination of whether materials are subject to discovery is separate and independent of whether that evidence will later be admissible at trial. *See* N.C. Gen. Stat. § 1A-1, Rule 26 (2009); N.C. Gen. Stat. § 8C-1, Rules 402-03 (2009); *see also Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 314, 248 S.E.2d 103, 106 (1978) (“A determination that particular information is relevant for discovery is not conclusive of its admissibility as relevant evidence at trial.”). The issue before us concerns N.C.G.S. § 1A-1, Rule 26 discovery of certain information and not an ultimate determination of relevance and admissibility at trial pursuant to N.C.G.S. § 1A-1, Rules 402-03.

N.C.G.S. § 1A-1, Rule 26 governs discovery and provides, in pertinent part, that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]” N.C.G.S. § 1A-1, Rule 26(b)(1). N.C. Gen. Stat. § 8-53 (2009) creates a privilege for confidential communications between patients and their physicians and provides in pertinent part:

No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. Any resident or presiding judge in the district, either at the trial or prior thereto, . . . may . . . compel disclosure if in his opinion disclosure is necessary to a proper administration of justice.

N.C.G.S. § 8-53.

Our Supreme Court has held that the physician-patient privilege is a qualified privilege and not an absolute one. *Sims v. Charlotte Liberty Mutual Insurance Co.*, 257 N.C. 32, 38, 123 S.E.2d 326, 331 (1962). The privilege belongs to the patient and may be waived by the patient either expressly or impliedly. *Capps v. Lynch*, 253 N.C. 18, 22-23, 116 S.E.2d 137, 141 (1960).

Defendant argues that Plaintiff waived her physician-patient privilege by filing this action and thereby placing her physical condition at issue. Defendant relies on *Jones v. Asheville Radiological Group, P.A.*, 134 N.C. App. 520, 518 S.E.2d 528 (1999) (Walker, J., dissenting

MIDKIFF v. COMPTON

[204 N.C. App. 21 (2010)]

in part) (dissent adopted by 351 N.C. 348, 524 S.E.2d 804 (2000)); *Spangler v. Olchowski*, 187 N.C. App. 684, 654 S.E.2d 507 (2007) and *Mims*. We find it helpful to consider the history of the physician-patient privilege in light of these three cases and therefore conduct the following review.

Capps, Cates, and Jones

In reviewing the history of the physician-patient privilege and circumstances amounting to waiver thereof, the issue of waiver by implication was addressed by our Supreme Court in 1960 in *Capps v. Lynch*. The defendant in *Capps* called the plaintiff's treating physician as a witness. *Capps*, 253 N.C. at 20, 116 S.E.2d at 139. The trial court did not allow the physician to testify concerning treatment given to the plaintiff, stating to defendant's counsel that:

This is a confidential matter between the doctor and the plaintiff and if they have no objection to you using him for that, you may do so. If they object to it, I will not let him say anything about it. He has no right to say anything about it without the consent of the plaintiff.

Id. at 21, 116 S.E.2d at 140. On appeal, the defendant argued that the plaintiff had waived the physician-patient privilege by testifying himself about the procedure performed by his doctor. *Id.* Our Supreme Court noted the following with respect to waiver:

A patient may surrender his privilege in a personal injury case by testifying to the nature and extent of his injuries and the examination and treatment by the physician or surgeon. Whether the testimony of the patient amounts to a waiver of privilege depends upon the provisions of the applicable statute and the extent and ultimate materiality of the testimony given with respect to the nature, treatment and effect of the injury or ailment. The question of waiver is to be determined largely by the facts and circumstances of the particular case on trial.

Id. at 23, 116 S.E.2d at 141. The Supreme Court ordered a new trial, holding that, under the circumstances before it, the plaintiff had indeed waived his privilege. *Id.* at 24-25, 116 S.E.2d at 142-43.

Our Supreme Court again addressed the question of implied waiver in *Cates v. Wilson*, 321 N.C. 1, 361 S.E.2d 734 (1987). In *Cates*, the Court noted that "[t]he principle underlying our decision in *Capps* is that when a patient discloses, or permits disclosure of, information

MIDKIFF v. COMPTON

[204 N.C. App. 21 (2010)]

gained by the physician during the physician-patient relationship, the rationale for the physician-patient privilege evaporates.” *Id.* at 14, 361 S.E.2d at 742. The Court noted that *Capps* established a test for waiver, “concluding that the issue must be resolved ‘largely by the facts and circumstances of the particular case on trial.’ ” *Id.* (quoting *Capps*, 253 N.C. at 23, 116 S.E.2d at 141). The *Cates* court further noted that certain situations “necessarily constitute implied waiver[,]” such as where the patient calls the physician to testify, or testifies himself, to the nature of the injuries or treatment. *Id.*

In *Jones*, our Court addressed the issue of waiver by implication. The plaintiff had previously filed a malpractice action against her gynecologist for his failure to diagnose her breast cancer. *Jones*, 134 N.C. App. at 522, 518 S.E.2d at 530. The plaintiff’s malpractice complaint made references to a certain mammogram ordered by the gynecologist and performed by a radiological facility. *Id.* at 523, 518 S.E.2d at 530-31. During the course of the malpractice action, the gynecologist’s malpractice insurer served requests for discovery on the plaintiff requesting, *inter alia*, “the medical records for all care and treatment received by plaintiff during the five-year period immediately preceding . . .” the malpractice action. *Id.*, 518 S.E.2d at 531. The plaintiff forwarded these records to the insurer as well as to her gynecologist. *Id.* The radiological facility subsequently released the plaintiff’s records to a physician retained as an expert by the defendant gynecologist. *Id.* at 524, 518 S.E.2d at 531. During the malpractice trial, the plaintiff, the defendant gynecologist, and the gynecologist’s experts “all testified in detail about the circumstances surrounding [the gynecologist’s] alleged failure to diagnose plaintiff’s breast cancer properly, including the mammogram procedure.” *Id.* The jury returned a verdict in favor of the defendant gynecologist and our Court found no error. *Id.* at 524-25, 518 S.E.2d at 531.

The plaintiff then filed a second action, which was later appealed to our Court. In her second action, the plaintiff alleged, *inter alia*, medical malpractice claims and breach of fiduciary duty and confidentiality against the radiological facility and its employees. *Id.* at 525, 518 S.E.2d at 531. The trial court granted summary judgment to the defendants as to all claims and the issue before our Court was, in pertinent part, whether there existed “genuine issues of material fact . . . as to whether plaintiff waived the physician-patient privilege with regards to [the radiological facility’s] unauthorized release of her films to [the gynecologist’s expert in the first medical malpractice action]”. *Id.*, 518 S.E.2d at 532.

MIDKIFF v. COMPTON

[204 N.C. App. 21 (2010)]

The majority in *Jones* began its analysis by noting that:

The filing of a medical malpractice suit by a patient against her physician, however, constitutes a limited implied waiver of the physician-patient privilege to the extent the defendant-physician may reveal the patient's confidential information *contained in the defendant-physician's own records* to third parties where it is reasonably necessary to defend against the suit.

Id. at 527-28, 518 S.E.2d at 533 (emphasis in the original). The majority continued, holding as follows:

In this case, plaintiff's medical malpractice suit against [the gynecologist] constituted an implied waiver of her physician-patient privilege. [The gynecologist], as a defendant-physician in that suit, therefore was free to disclose to third parties *his own records* containing plaintiff's confidential information, to the extent he reasonably believed necessary in defending against plaintiff's action. In addition, plaintiff's filing of the underlying action against [the gynecologist] *combined with* her subsequent conduct during the course of the medical malpractice action impliedly waived her physician-patient privilege as to records relating to plaintiff's breast cancer which were *not* in [the gynecologist's] possession. It is the effect of plaintiff's waiver as to these records (*i.e.*, plaintiff's mammography films prepared by and in the possession of [the radiological facility]), which is at issue in this case.

Id. at 528, 518 S.E.2d at 533-34. The majority concluded that, because the records were not in the possession of a defendant to the first malpractice action, "even after plaintiff's waiver, the films only could be disclosed pursuant to statutorily authorized discovery procedures or pursuant to plaintiff's authorization." *Id.* at 529, 518 S.E.2d at 534. The majority then reversed summary judgment as to the plaintiff's claims regarding confidentiality and waiver of privilege. *Id.*

Dissenting in part, Judge Walker analyzed "when a patient effectively waives the privilege, and the extent to which the privilege is waived." *Id.* at 530, 518 S.E.2d at 535. Judge Walker discussed *Cates* and set forth the test for determining waiver as set out above. *Id.* at 530-31, 518 S.E.2d at 536. Judge Walker then cited the concurring opinion in *Cates*, wherein Justice Mitchell

stated it was time for the Court to recognize an exception to the physician-patient privilege which has already been adopted by

MIDKIFF v. COMPTON

[204 N.C. App. 21 (2010)]

the majority of jurisdictions, the patient-litigant exception. That exception recognizes that when a patient files a medical malpractice action against her treating physician in which an essential part of the claim is the existence of a physical ailment, there should be a waiver of the privilege for all communications causally or historically related to that ailment. *However, the Court concluded that a waiver had occurred under the facts and therefore declined to adopt that exception.*

Here, when plaintiff filed the [malpractice] action, she directly put her medical condition at the time of the mammogram procedure at issue. *Thereafter, plaintiff's conduct during the course of the [malpractice] action clearly establishes a waiver of her physician-patient privilege.* . . . All of these facts and circumstances lead to the conclusion that plaintiff never manifested a desire to preserve her physician-patient privilege as to [the gynecologist].

Id. at 531-32, 518 S.E.2d at 535-36 (citations omitted, emphasis added). Judge Walker then stated that he found that the waiver as to the gynecologist was sufficient to preclude the plaintiff's confidentiality claims against the radiological facility. *Id.* at 532, 518 S.E.2d at 536. Judge Walker so concluded because, once the records were properly in the hands of the gynecologist pursuant to discovery, "no further discovery was necessary in order for [the gynecologist] to permit [his expert witness] to review these medical records and films." *Id.* Judge Walker then stated that he would hold that "the waiver of the privilege as to [the gynecologist] precludes any claims against [the radiological facility, its employee and the expert witness]." *Id.* On appeal, the Supreme Court reversed our Court's decision as to this issue, "[f]or the reasons stated in Judge Walker's dissenting opinion[.]" *Jones v. Asheville Radiological Group, P.A.*, 351 N.C. 348, 524 S.E.2d. 804 (2000).

Jones' Progeny

Our Court has interpreted *Jones* in two pertinent opinions. First, in *Mims*, we addressed the issue of whether a defendant who responded to a plaintiff's allegations of negligence waived his physician-patient privilege. The trial court in *Mims* determined that, by simply driving a car, the defendant had waived her physician-patient privilege with respect to an action concerning the defendant's alleged negligence in driving the car. *Mims*, 157 N.C. App. at 342, 578 S.E.2d at 609. The plaintiff sought to introduce the defendant's medical records, and the trial court compelled discovery over the defendant's

MIDKIFF v. COMPTON

[204 N.C. App. 21 (2010)]

assertion of physician-patient privilege, concluding that “[t]he [d]efendant, by driving, waived the physician-patient privilege, and the medical records of [d]efendant are relevant and material and may lead to the discovery of admissible or relevant evidence and should be produced in discovery[.]” *Id.* at 340, 578 S.E.2d at 608. Our Court held that this was error. *Id.* at 342, 587 S.E.2d at 609.

In determining whether the trial court erred, our Court reviewed the law as follows:

In this case, there is absolutely no authority to support the trial court’s conclusion that defendant waived the physician-patient privilege simply by driving. Instead, our courts have ruled that implied waivers occur where: the patient fails to object to testimony on the privileged matter; the patient herself calls the physician as a witness and examines him as to the patient’s physical condition; or the patient testifies to the communication between herself and the physician. *Capps v. Lynch*, 253 N.C. 18, 23, 116 S.E.2d 137, 141 (1960). *Subsequent case law has also recognized an implied waiver where a patient by bringing an action, counterclaim, or defense directly placed her medical condition at issue. See Jones v. Asheville Radiological Grp.*, 134 N.C. App. 520, 531, 518 S.E.2d 528, 535 (1999) (Walker, J., dissenting in part) (citing *Cates v. Wilson*, 321 N.C. 1, 17, 361 S.E.2d 734, 744 (1987) (Mitchell, J., concurring in the result)), rev’d, 351 N.C. 348, 524 S.E.2d 804 (2000) (per curiam); *see also State v. Smith*, 347 N.C. 453, 461-62, 496 S.E.2d 357, 362 (1998) (where the defendant sought to suppress his statements to the police by arguing he had been suffering from controlled substance withdrawal symptoms, the defendant placed at issue his past state of mind, and the State properly sought to rebut this evidence with his medical records); *Laznovsky v. Laznovsky*, 357 Md. 586, 745 A.2d 1054, 1067 (2000) (“[w]hen a party-patient places a condition in issue by way of a claim, counterclaim, or affirmative defense, she waives the physician-patient privilege as to all matters causally or historically related to that condition, and information which would otherwise be protected from disclosure by the privilege then becomes subject to discovery”). Thus, had defendant, through her answer, placed her medical condition at issue, there would be an implied waiver of the physician-patient privilege; however, defendant simply denied plaintiff’s allegation of negligence and, in the alternative, raised the defense of contributory negligence. As nothing in her answer or subsequent conduct during the course of dis-

MIDKIFF v. COMPTON

[204 N.C. App. 21 (2010)]

covery opened the door to an inquiry into defendant's medical history, the trial court abused its discretion in concluding defendant had waived her privilege.

Id. at 342-43, 578 S.E.2d at 609 (emphasis added).

Citing *Mims*, our Court again addressed this issue in *Spangler v. Olchowski*, 187 N.C. App. 684, 654 S.E.2d 507 (2007). In *Spangler*, we held that "neither federal nor state law prohibited the trial court from ordering disclosure of the [information allegedly protected by the physician-patient privilege]." *Id.* at 693, 654 S.E.2d at 514. Determining whether the plaintiff had waived her privilege under North Carolina law, we conducted the following analysis:

This patient-physician privilege is not absolute, however, and may be waived, either by express waiver or by waiver implied from the patient's conduct. *Mims v. Wright*, 157 N.C. App. 339, 342, 578 S.E.2d 606, 609 (2003). *We have recognized that a patient impliedly waives this privilege when she opens the door to her medical history by bringing an action, counterclaim, or defense that places her medical condition at issue.* *Id.* at 342-43, 578 S.E.2d at 609. Here, by bringing a claim for emotional distress, which alleges that defendants' actions caused decedent to withdraw from her college studies and caused an overall loss in decedent's enjoyment of life, we find that plaintiff has placed decedent's mental health and history of substance abuse at issue. Thus, plaintiff has impliedly waived the patient-physician privilege conferred by § 8-53 *et seq.*

Id. at 691, 654 S.E.2d at 513.

After a careful review of the opinions filed in *Jones*, and in light of the history of the physician-patient privilege, we question the *Mims* Court's restatement of the holding in *Jones*. We first address *State v. Smith*, the first of two other cases cited in *Mims* for the proposition that North Carolina has adopted the patient-litigant exception. In an opinion decided before *Jones*, our Supreme Court determined that a defendant had placed his mental health at issue by basing his motion to suppress evidence on an allegation that he was unwell while he gave certain contested statements. *State v. Smith*, 347 N.C. 453, 461-62, 496 S.E.2d 357, 362 (1998). The Supreme Court conducted the following analysis:

Defendant sought to suppress statements he made to the police while in jail by arguing that he was suffering from controlled sub-

MIDKIFF v. COMPTON

[204 N.C. App. 21 (2010)]

stance withdrawal symptoms and would therefore have been in no condition mentally to give statements to the police. Defendant thus placed at issue his state of mind during the time he was in jail, and the State properly sought to rebut that evidence with his medical records from jail. Defendant makes no argument, and we perceive no reason to believe, that the trial court abused its discretion in ordering the medical records disclosed. This assignment of error is overruled.

Id. We find this analysis inapposite as to the issue of whether a patient, by bringing an action against a defendant, thereby waives the physician-patient privilege as to medical records related to the alleged injuries.

We further note that the second case *Mims* cites, *Laznovsky v. Laznovsky*, 357 Md. 586, 745 A.2d 1054 (2000), is a Maryland case, and although another state's case law can be informative and persuasive authority, it is not sufficient to justify our Court in holding in contrast with our Supreme Court.

We now address our interpretation of *Jones* in *Mims*. In *Mims*, our one-sentence statement of the law for which *Jones* was offered was as follows: "Subsequent case law has also recognized an implied waiver where a patient by bringing an action, counterclaim, or defense directly placed her medical condition at issue." *Id.* at 342-43, 578 S.E.2d at 609. We believe support for this language can be found in only one paragraph of Judge Walker's dissent. That paragraph concerns the patient-litigant exception:

In his concurring opinion in *Cates*, Justice (now Chief Justice) Mitchell stated it was time for the Court to recognize an exception to the physician-patient privilege which has already been adopted by the majority of jurisdictions, the patient-litigant exception. That exception recognizes that when a patient files a medical malpractice action against her treating physician in which an essential part of the claim is the existence of a physical ailment, there should be a waiver of the privilege for all communications causally or historically related to that ailment. *However, the Court concluded that a waiver had occurred under the facts and therefore declined to adopt that exception.*

Jones, 134 N.C. App. at 531, 518 S.E.2d at 535 (citations omitted, emphasis added). A close examination of this statement reveals that Judge Walker merely referenced Justice Mitchell's observations

MIDKIFF v. COMPTON

[204 N.C. App. 21 (2010)]

on the law and himself observed that this course was not adopted by the Court. Continuing, Judge Walker's dissent applied the following analysis:

Here, when plaintiff filed the [malpractice] action, she directly put her medical condition at the time of the mammogram procedure at issue. *Thereafter, plaintiff's conduct during the course of the [malpractice] action clearly establishes a waiver of her physician-patient privilege. . . .* All of these facts and circumstances lead to the conclusion that plaintiff never manifested a desire to preserve her physician-patient privilege as to [the gynecologist].

Id. at 531-32, 518 S.E.2d at 535-36. This analysis, based on facts and circumstances, clearly applies the *Capps* and *Cates* test for determining whether an implied waiver has occurred. *See Cates*, 321 N.C. at 14, 361 S.E.2d at 742 ("the issue must be resolved 'largely by the facts and circumstances of the particular case on trial.'" (quoting and discussing *Capps*, 253 N.C. at 23, 116 S.E.2d at 141)). Thus, we question the holdings of *Mims* and *Spangler* to the extent those opinions misinterpret *Jones*.

However, we are without authority to overrule opinions of our Court. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Though we question the reasoning of those rulings, we are bound to follow *Mims* and *Spangler*. We therefore conduct the following analysis.

Analysis

Spangler concerned a medical malpractice action against the defendants who performed a gastric bypass surgery on the decedent. *Spangler*, 187 N.C. App. at 687, 654 S.E.2d at 510. The decedent died of unrelated causes during the course of litigation. The decedent's father, as executor of decedent's estate, was substituted as the party-plaintiff. *Id.* The plaintiff alleged, *inter alia*, that complications due to the surgery forced the decedent to undergo a second procedure and caused the decedent to suffer "unnecessary conscious physical pain and emotional distress[.]" *Id.*

The defendants sought "discovery of all medical records for the ten-year period preceding [the date of the surgery], and medical

MIDKIFF v. COMPTON

[204 N.C. App. 21 (2010)]

records up to the date of trial.” *Id.*, 654 S.E.2d at 510-11. The defendants’ motion to compel discovery was granted and the plaintiff did not appeal at that time, but several months later filed a motion for a protective order. *Id.* at 687-88, 654 S.E.2d at 511. In his motion for a protective order, the plaintiff sought to shorten the period for production of medical records by two days and to protect from disclosure records relating to substance abuse treatment obtained by the decedent. *Id.* at 688, 654 S.E.2d at 511.

The trial court denied the plaintiff’s motion for a protective order, finding that:

A. [The decedent’s] Estate is seeking damages for pain and suffering and emotional distress.

B. Mental suffering often results in substance abuse and records relating to substance abuse treatment may be relevant to mental pain.

C. In that the [p]laintiff has put before the Court a claim for emotional distress, all medical records which the [p]laintiff asserts are protected from disclosure under 42 CFR § 2.1[sic] *et seq.* and N.C.G.S. § 122C-52, *et seq.* are discoverable and shall be produced.

Id. The plaintiff appealed, contending in part that the trial court erred by ordering disclosure of the records of substance abuse treatment. *Id.* at 688-89, 654 S.E.2d at 511.

Our Court affirmed the trial court’s order, holding that the plaintiff had waived his physician-patient privilege.

This patient-physician privilege is not absolute, however, and may be waived, either by express waiver or by waiver implied from the patient’s conduct. We have recognized that a patient impliedly waives this privilege when she opens the door to her medical history by bringing an action, counterclaim, or defense that places her medical condition at issue. Here, by bringing a claim for emotional distress, which alleges that [the] defendants’ actions caused decedent to withdraw from her college studies and caused an overall loss in decedent’s enjoyment of life, we find that [the] plaintiff has placed decedent’s mental health and history of substance abuse at issue. Thus, [the] plaintiff has impliedly waived the patient-physician privilege conferred by § 8-53 *et seq.*

MIDKIFF v. COMPTON

[204 N.C. App. 21 (2010)]

Id. at 691, 654 S.E.2d 513 (internal citations omitted). We note, as interpreted under *Mims* and *Spangler*, our Supreme Court has limited this implied waiver to information “causally or historically related to the claims.” *Jones*, 134 N.C. App. at 531, 518 S.E.2d at 535.

In the case before us, Plaintiff brought a personal injury action alleging, *inter alia*, that “Plaintiff has suffered and will continue to suffer great pain of body and mind[.]” Defendant sought medical records for the preceding ten years and, upon Plaintiff’s motion, the trial court limited the production of Plaintiff’s medical records to the preceding five years.

Plaintiff impliedly waived her physician-patient privilege as to medical records causally or historically related to her “great pain of body and mind.” The trial court heard Defendant’s arguments asserting possible medical reasons for Plaintiff’s pain that predated the accident and thereafter reduced the scope of discovery from the requested ten years to five years. We review a trial court’s decision concerning discovery matters for an abuse of discretion. *Midgett*, 58 N.C. App. at 737, 294 S.E.2d at 388. In light of *Spangler*, we can find no decision that is “manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. We therefore find no abuse of discretion.

In Camera Review

Plaintiff argues that the privilege provided by N.C.G.S. § 8-53 is deemed destroyed *eo instante* the moment of compelled disclosure, and that the trial court should have conducted an *in camera* review of the records sought in order to prevent disclosure of irrelevant or causally unrelated evidence. We disagree. The decision to conduct *in camera* review rests “‘in the sound discretion of the trial court.’” *Spangler*, 187 N.C. App. at 693, 654 S.E.2d at 514 (quoting *Midgett*, 58 N.C. App. at 736, 294 S.E.2d at 387).

At the hearing on Plaintiff’s motion for a protective order, the trial court made the following statement:

Might be difficult for me to review these records in camera and make a snap judgment after a quick review as to whether something is relevant or not because I don’t know what sort of evidence will be developed later, what kind of issues may come up.

...

MIDKIFF v. COMPTON

[204 N.C. App. 21 (2010)]

But would it not make more sense to allow the motion to compel that the defendant has put forth with the caveat that when the matter comes to trial if there are concerns about maybe some diagnosis . . . that may not have anything to do with the case and as the case develops that's clearly not fair, let the trial judge be the judge of what will be divulged or not?

The trial court then compelled discovery of the records with the following limitations: the scope of the discovery was narrowed from the preceding ten years to the preceding five years and the records were subject to review only by Defendant's attorneys and their staff.

The procedure used by the trial court (1) allows Defendant to prepare a defense, (2) limits disclosure of potentially unrelated matters to Defendant's attorneys and their staff only, and (3) places the ultimate review of the relevance and causal relationship of the records in the hands of the judge at the trial on the merits, who is in the best position to make the determination of admissibility. In the present case, the trial court simply demurred from making an evidentiary ruling which the trial court stated can better be made by the presiding trial judge, who will have a better understanding of the issues in the case and will be in a better position to make such determinations. We cannot say this was a result "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Therefore, we find no abuse of discretion.

Failure to Provide that Disclosure was Necessary

Plaintiff also argues the trial court erred in compelling disclosure of her medical records without making a specific finding, or without making it clear in the record, so as to leave no question or doubt that the trial court was controlling the disclosure of the records. Plaintiff also argues the trial court was required to make it clear in the record that, in the trial court's opinion, the disclosure was necessary to a proper administration of justice. However, it is only when a trial court compels disclosure of privileged information that such findings are implicated. N.C.G.S. § 8-53; *Sims*, 257 N.C. at 38, 125 S.E.2d at 331. Because we have held that Plaintiff impliedly waived her privilege with respect to these records, we need not address this issue. Plaintiff's assignment of error is overruled.

Affirmed.

Judge JACKSON concurs.

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

Judge STEELMAN concurs in the result with a separate opinion.

STEELMAN, Judge concurs in separate opinion.

I fully concur in parts II and III of the majority opinion. As to part I, I concur in the result.

The majority focuses upon plaintiff's claim for pain and suffering to support the waiver of plaintiff's physician-patient privilege. This view is too narrow. By instituting an action for personal injury, regardless of whether there is a claim for pain and suffering, a plaintiff may impliedly waive the physician-patient privilege. The scope of that waiver must be determined by the allegations contained in the pleadings, and the nature and extent of the injury. *See Spangler v. Olchowski*, 187 N.C. App. 684, 691, 654 S.E.2d 507, 513 (2007) ("[A] patient impliedly waives this privilege when she opens the door to her medical history by bringing an action, counterclaim, or defense that places her medical condition at issue." (citation omitted)). A defendant is entitled to discover the condition of the plaintiff at the time of the alleged injury in order to properly evaluate whether the plaintiff's condition is the result of that injury, an aggravation of a pre-existing condition, or solely due to a pre-existing condition.

I discern no abuse of discretion on the part of the trial judge in the instant case. I concur with the majority that the fact that plaintiff has produced material in discovery is not determinative as to whether it will be admissible at trial.

STATE OF NORTH CAROLINA v. DOUGLAS CHARLES LePAGE

No. COA09-842

(Filed 18 May 2010)

1. Evidence— prior crimes or bad acts—harmless error

Even assuming *arguendo* that the trial court erred in a sexual offense case by admitting evidence of defendant's prior sexual actions, the error was harmless where there was overwhelming evidence of defendant's guilt in this case.

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

2. Appeal and Error— preservation of issues—jury instructions

Defendant properly preserved for appellate review his argument that the trial court erred in its instruction to the jury concerning the use of N.C.G.S. § 8C-1, 404(b) evidence because defendant requested a jury instruction from N.C.P.I.-Crim 104.15 at the charge conference.

3. Criminal Law— jury instructions—404(b) evidence—harmless error

Even if the trial court erred in instructing the jury regarding the proper use of evidence admitted under N.C.G.S. § 8C-1, Rule 404(b), given the overwhelming evidence of defendant's guilt of the charged sexual offenses, there existed no reasonable possibility that a different result would have been reached had the error not been made.

4. Criminal Law— jury instructions—first-degree sexual offense—supported by the evidence

The trial court did not commit plain error in its instruction to the jury on first-degree sexual offense because the evidence was sufficient to support the trial court's instruction.

5. Drugs— indictments fatally flawed—no subject matter jurisdiction

Defendant's convictions for delivery of a controlled substance and contaminating food with a controlled substance were vacated where the indictments for the offenses were fatally flawed. The indictments alleged that the controlled substance used by defendant was "benzodiazepines, which is included in Schedule IV of the North Carolina Controlled Substances Act[,]" but benzodiazepines are not listed in Schedule IV and there exist derivatives of the benzodiazepine category of drugs that are not listed under Schedule IV.

Appeal by Defendant from judgments entered 3 October 2008 by Judge C. Philip Ginn in Superior Court, Macon County. Heard in the Court of Appeals 27 January 2010.

Attorney General Roy Cooper, by Assistant Attorney General Kevin Anderson, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for Defendant-Appellant.

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

McGEE, Judge.

Douglas Charles LePage (Defendant) was indicted on 2 April 2007 for statutory sex offense, delivering a controlled substance to a minor, indecent liberties with a minor, two counts of contaminating food with a controlled substance, and possessing a controlled substance with the intent to deliver. A jury found Defendant guilty as charged. Defendant was sentenced to consecutive sentences of 238 to 295 months, 64 to 86 months, 16 to 20 months, and 6 to 8 months, in prison. Defendant appeals.

The evidence at trial tended to show that Defendant was acquainted with JBS, the fourteen-year-old daughter of a friend. Defendant and his wife, Karen Smith (Smith), asked JBS's parents if JBS could spend the night of 6 January 2007 at their home. Defendant intended for JBS to help him make a collage for Smith who was depressed because her daughter was not home for the holidays. JBS's parents agreed.

Defendant picked JBS up at 6:00 p.m. on 6 January 2007 and brought her to his house. Defendant, Smith, and JBS ate dinner together. Smith left the house for an 8:00 p.m. meeting, and Defendant and JBS worked on the collage. Smith returned to the house at 9:15 p.m. Defendant and JBS gave Smith the collage, and the three then watched a movie in the master bedroom.

At trial, JBS testified that Defendant served Smith and JBS portions of a banana cream pie around 10:00 p.m. JBS did not want to eat the pie, but Defendant repeatedly encouraged her to do so. JBS noticed that one bite of the pie was "very, very salty[.]" though the rest of her portion was very sweet. Shortly after eating, Smith and JBS fell asleep. JBS awoke during the movie and went to the guest bedroom. JBS said it was unusual for her to fall asleep so early in the evening.

Defendant came into the guest bedroom at some point during the night and told JBS that Smith's snoring was keeping him awake. He told JBS he usually came into the guest bedroom if Smith's snoring was bothering him. JBS offered to move to the other guest bedroom, but Defendant said, "[n]o, no, it's okay[.]" Defendant kissed JBS on the mouth and told her she was "a good kisser."

JBS "remember[ed] a hand going down into [her] pants and then [she] felt something weird going up into [her] body." JBS felt "something funky that [she] had never felt before," and felt Defendant's

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

hand “on [her] skin.” JBS then “blackened out” and she remembered nothing else that occurred that evening. She was not aware of anything being wrong with her private area before going to Defendant’s house for the night.

JBS’s father testified that JBS was supposed to return home by 9:00 a.m. on 7 January 2007. JBS’s father reached Defendant by telephone and Defendant told him that Smith was sick. JBS’s father went to Defendant’s house to pick up JBS. When he picked up JBS, she was lethargic and her speech was slurred. She was unable to tie her own shoes and could not control her movements. While in the car, JBS was “blurting . . . statements out.” She said, “[h]e kissed me[,]” “[h]is tongue was so big[,]” and “I felt his hand.” JBS’s father then took her to the Macon County Sheriff’s office.

Macon County Sheriff Robert Holland (Sheriff Holland) testified that JBS stated that she went to sleep in the guest room and woke up with Defendant lying in bed next to her. Defendant rolled over to her side of the bed and “started putting his hand around” her vaginal area and “would rub fast and quick, going back and forth.” JBS told Sheriff Holland that “she [was] not sure what sex is, but she thinks that they had sex . . . because their tongues were in each other[.]” Sheriff Holland arranged an appointment for JBS later that day with Dr. Jennifer Brown (Dr. Brown), a pediatrician at “Kid’s Place, [the] local child advocacy center.”

Dr. Brown testified that she performed an evaluation on JBS on 7 January 2007 and found that JBS was “clearly impaired.” JBS had abrasions and swelling in and around her vaginal and anal areas. There was a “crusty discharge” on her pubic hair, and a fresh laceration in JBS’s posterior fourchette. The area around her anus was red and there was a new laceration there as well. JBS had three linear marks on her right arm, a puncture mark on the inside of her left arm, a bruise on her neck, and markings on her breasts. JBS was unsteady, her speech was slurred, and she appeared to be intoxicated.

JBS told Dr. Brown that one bite of the pie had tasted differently from the rest of the pie; that Defendant had gotten into bed with her, kissed her, and rubbed her vaginal area and breasts. Dr. Brown opined that JBS’s “posterior fourchette and anal lacerations . . . [were] consistent with [JBS’s] history and with penetrating injury.” Dr. Brown testified that, during her examination of JBS’ genital area, JBS had fallen asleep. When Dr. Brown touched JBS’ genital region, JBS cried out in pain, despite being asleep.

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

Smith testified that she fell asleep during the movie and slept until 2:00 p.m. the next day. When Smith awoke the next day, she felt “[w]oozy [and] nauseous[,]” and she vomited. A friend came to Smith’s house and took her to the hospital, where Smith displayed symptoms similar to those of JBS. Smith returned home on 8 January 2007 and asked Defendant what had happened. Defendant at first blamed Smith’s symptoms on the dinner they had eaten the prior evening, but then told Smith he had put drugs in the pie so that he and Smith could have “a relaxing sexual experience.” Defendant said that JBS must have gotten the drugged pie by mistake. Smith also testified that Defendant had received a package containing “[c]lonazepam or pine, one of the two” a few days earlier.

Smith told Defendant to leave the house. Defendant left and went to visit his female cousin, L.E., in Ohio. Defendant then went to Miami and returned to North Carolina near the end of January 2007. Smith also testified that, after returning home from the hospital, she found sex toys in a bag under a bed in her house. Smith had never seen these implements before and thought the bag and the toys had “left with [Defendant] when he left [for Ohio].”

Sheriff Holland first questioned Defendant on 7 January 2007. Sheriff Holland testified that Defendant stated that he sometimes slept in the guest bedroom and masturbated there. Sheriff Holland also interviewed Defendant on 29 January 2007. Defendant admitted to Sheriff Holland that he had put medication in the pie, and had kissed JBS and touched her breasts. Defendant said the use of medication prior to sexual activities was common between him and Smith. Defendant told Sheriff Holland that Smith did not want to know the medication was in the pie on 6 January 2007, and that he did not purposefully drug JBS.

Special Agent Aaron Joncich of the State Bureau of Investigation (Agent Joncich) testified that he tested samples of JBS’s urine and the “test indicated the presence of a class of drugs called [b]enzodiazepines.” Agent Joncich testified that JBS’s urine contained a “metabolite of Clonazepam[,]” a drug used as a sleep aid which can cause “anterograde amnesia[.]” He testified that anterograde amnesia “means after you take that drug you forget things during the activity of that drug in your body.” Davis Speed, a medical technologist at Angel Medical Center, testified that he also found the presence of benzodiazepines in Smith’s urine.

Defendant presented evidence through his own testimony. He testified that he placed “benzodiazepine” in the banana cream pie, but

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

only drugged the piece he served to Smith. When JBS went to the guest bedroom to change for bed, he followed her. When Defendant and JBS were making the collage earlier in the evening, JBS had told Defendant that she was worried she was not a good kisser. Defendant kissed JBS in the guest bedroom and told her she was a good kisser. Defendant stayed in the room for less than ten minutes and then went back to the master bedroom where they finished watching the movie and Defendant fell asleep next to Smith. Defendant did not leave the master bedroom again until morning. Defendant also denied having put his hand in JBS's pants and testified that, if JBS was injured, the injuries occurred before she came to his house.

404(b) Evidence

At trial, the State presented the following evidence pursuant to N.C. Gen. Stat. § 8C-1 Rule, 404(b). First, the trial court offered the testimony of B.E. B.E. testified that in July 2006, when she was sixteen years old, she met Defendant at an Alcoholics Anonymous meeting. Within a few months of becoming friends with Defendant, Defendant began to discuss his sexual problems with B.E. Defendant told her that he could no longer have sex because he had injected drugs into his groin. However, Defendant told B.E. that he could “make [B.E.] feel like a woman, meaning perform oral sex [on her], touch [her], protrude [sic] [her] in other ways.” Defendant told B.E. that he did not have a problem with her age because “it’s legal in North Carolina.” B.E. ended her relationship with Defendant because she “got scared.” Defendant contends that the “trial court erred in admitting this evidence because it was not sufficiently similar to the charged offenses.”

The State also presented a videotape displaying sexual activity involving Defendant and his female cousin, L.E. The video was taken during the time Defendant left his home and went to stay with L.E. in Ohio. In the video, Defendant can be seen inserting objects into L.E.’s vagina. L.E. did not appear to be conscious during the activity, and she testified at trial that she did not remember the activity. L.E. also testified that she did not consent to the activity and that she remembered being ill and vomiting during Defendant’s visit.

The B.E. Evidence

[1] Defendant first argues that the trial court erred in admitting evidence of Defendant’s prior actions with B.E. Defendant contends that our Court reviews a trial court’s ruling on the relevance of evidence *de novo*. However, we review a trial court’s ruling on the admissibil-

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

ity of evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) for an abuse of discretion. *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907 (2006).

N.C. Gen. Stat. § 8C-1, Rule 404(b) provides in pertinent part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009). Our Supreme Court has held that

Rule 404(b) “state[s] a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.”

Rule 404(b) evidence, however, should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused.

State v. Al-Bayyinah, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)) (emphasis omitted). Evidence offered under Rule 404(b) must be analyzed focusing on “the requirements of similarity and temporal proximity.” *Id.*, 567 S.E.2d at 123.

Even assuming, *arguendo*, that the trial court did commit error, we find that such error would be harmless. “The party who asserts that evidence was improperly admitted usually has the burden to show the error and that he was prejudiced by its admission.’ . . . Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial.” *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001) (citations omitted).

Excluding B.E.’s testimony, the evidence at trial tended to show: (1) Defendant admitted to having drugged Smith and JBS; (2) Defendant admitted to having kissed JBS and having touched her breasts; (3) the videotape showed Defendant using sex toys with an

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

apparently drugged L.E.; (4) L.E. testified that she had not consented to the actions shown on the videotape and that she did not remember engaging in those actions; (5) JBS's medical exams showed the presence of the drugs Defendant admitted to applying to the pie; (6) Smith found sex toys that she had previously not known about under Defendant's side of their bed; (7) those sex toys went missing at the same time Defendant left to go to Ohio to stay with L.E.; (8) Smith had earlier found a package addressed to Defendant which contained "Clonazepam or Pine[;]" (9) JBS's urine sample contained a metabolite of Clonazepam, indicating that she had recently ingested that drug; and (10) Smith's urine also showed the presence of one of a class of drugs that includes Clonazepam.

We find that there was overwhelming evidence of Defendant's guilt and that the admission of evidence of Defendant's proposition to B.E. would have no probable impact on the jury's decision. *See State v. Zinkand*, 190 N.C. App. 765, 771, 661 S.E.2d 290, 293 ("Additionally, in light of the overwhelming evidence, as detailed earlier, of defendant's guilt, defendant cannot show prejudice in the trial court's admission of the challenged evidence as it would have no probable impact on the jury's decision."), *disc. review denied*, 362 N.C. 513, 668 S.E.2d 783 (2008). We therefore find no prejudicial error as to this issue.

Jury Instructions

[2], [3] Defendant argues that the trial court erred in instructing the jury that it might consider certain evidence admitted, pursuant to N.C.G.S. § 8C-1, Rule 404(b), for the purpose of showing "the unnatural disposition of [Defendant] to commit one or more of the crimes with which he is charged." Specifically, Defendant contends that the jury was allowed to consider B.E.'s testimony and the videotape for an improper purpose.

Defendant requested a jury instruction from N.C.P.I.-Crim 104.15. The trial court granted Defendant's request, and gave the following instruction:

In addition, ladies and gentlemen, evidence has been received during the course of this trial which tends to show evidence that . . . [D]efendant had attempted a relationship with a witness, [B.E.], and also that there were some acts which were depicted in the video. This evidence has been received for certain purposes. This type of evidence, ladies and gentlemen, of prior acts of . . .

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

[D]efendant or intended acts of . . . [D]efendant are accepted for the purpose of showing that . . . [D]efendant had a motive for the commission of the crime or crimes charged in this case; that . . . [D]efendant had the intent, which is a necessary element, of the crimes in this case; that . . . [D]efendant had the knowledge which is a necessary element of the crime which is charged in this case; that . . . [D]efendant had the—that there existed in the mind of . . . [D]efendant a plan, a scheme, a system or design involving the crimes which have been alleged in these cases before you; that . . . [D]efendant had the opportunity to commit the crime and the absence of mistake or accident. *And in addition they have been admitted to show, if you in fact find that they do, the unnatural disposition of . . . [D]efendant to commit one or more of the crimes with which he's charged.*

(Emphasis added). Defendant did not object to the instructions after they were given. Defendant assigns error specifically to that portion of the instruction concerning Defendant's "unnatural disposition." We note that this language is not contained within the main text of N.C.P.I.—Crim. 104.15, but instead derives from footnote 1 to the pattern instruction. *See* N.C.P.I.—Crim. 104.15 (2008).

We must first address whether this argument is properly before us. Defendant contends that this argument was preserved for review because "[a] request for an instruction at the charge conference sufficiently complies with Rule 10(b)(2) to preserve the error for appeal where the requested instruction is promised but is not given as was agreed upon." Defendant relies on *State v. Keel*, 333 N.C. 52, 423 S.E.2d 458 (1992), wherein the defendant was charged with first-degree murder. In that case, the State specifically requested that the trial court give the portion of N.C.P.I.—Crim. 206.13 relevant to first-degree murder and the defendant did not object. *Keel*, 333 N.C. at 56, 423 S.E.2d at 461. The trial court then gave the requested instruction, but included language from a footnote of N.C.P.I.—Crim. 206.13, which was relevant only to second-degree murder or manslaughter charges. *Id.* at 57, 423 S.E.2d at 461-62.

Our Supreme Court held that "[t]he State's request, approved by the defendant and agreed to by the trial court, satisfied the requirements of Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure and preserved this question for review on appeal." *Id.* at 56, 423 S.E.2d at 461; *see also State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988) ("[A] request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.”).

In *Keel*, the State requested, by number, a portion of a specific instruction from the pattern jury instruction and the trial court diverged from that request by using additional language from a portion of the pattern instruction that was neither specifically requested nor legally correct or relevant. *Keel*, 333 N.C. at 56-57, 423 S.E.2d at 461-62. Also in *Ross*,

[the] defendant requested, and the trial judge indicated he would give, a jury instruction concerning defendant's decision not to testify in his own defense at trial. Yet, the transcript reveals, and the parties agree, that for whatever reason—perhaps the tension associated with any capital murder trial—the trial judge neglected to give the requested and promised jury instruction.

Ross, 322 N.C. at 264, 367 S.E.2d at 891.

We next compare these cases to the facts before us. In the present case, Defendant requested the “jury be instructed in accord with N.C.P.I.—Crim. 104.15-EVIDENCE OF SIMILAR ACTS OR CRIMES.” In light of *Keel* and *Ross*, Defendant's request “satisfied the requirements of Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure and preserved this question for review on appeal.” *Keel*, 333 N.C. at 56, 423 S.E.2d at 461.

A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.”

N.C. Gen. Stat. § 15A-1443(a) (2009). Assuming, *arguendo*, that the trial court committed error by including the additional language in its jury instruction, we find there is no reasonable possibility that a different result would have been reached at trial had the questioned language not been included.

Considering the overwhelming evidence reviewed above, we find that the requested instruction would have had little effect. If the trial court had instructed the jury with only the text of N.C.P.I.—Crim. 104.15, and had not included the language from footnote 1, the jury would have been allowed to consider the videotape and B.E.'s testi-

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

mony only for the limited purposes of finding common identity, motive, intent, common plan or scheme, opportunity, knowledge, lack of mistake, lack of entrapment, or the absence of accident. *See* N.C.P.I.—Crim. 104.15. In light of the substantial evidence against Defendant, there existed no reasonable possibility that a different result would have been reached had only the requested instruction been given. We therefore find no prejudicial error as to this issue.

First-Degree Sex Offense

[4] Defendant also argues that the trial court erred in that its instruction to the jury on first-degree sex offense allowed the jury to convict on an unsupported theory. Specifically, Defendant contends that the instruction given allowed the trial court to find Defendant guilty based on anal penetration, which was a theory unsupported by the evidence at trial. Defendant did not object to this portion of the instruction at trial and, on appeal, argues that the error constituted plain error.

In order for a trial court to instruct the jury on a particular theory of guilt, that theory must be supported by both the indictment and the evidence presented at trial. *State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986). An instruction which allows a jury to convict a defendant on a theory of guilt unsupported by either the evidence presented, or the indictment, may rise to the level of plain error. *Id.* We review the evidence to determine whether, when taken in the light most favorable to the State, it warrants the trial court's giving the instruction to the jury. *State v. Grooms*, 353 N.C. 50, 80-81, 540 S.E.2d 713, 732 (2000) ("These facts, taken in the light most favorable to the State, permit an inference that defendant had a consciousness of guilt and took steps, albeit unsuccessful, to avoid apprehension. Thus, the trial court's jury instruction on flight was justified."); *see also State v. Rouse*, — N.C. App. —, 679 S.E.2d 520 (2009).

In the case before us, the trial court give the following instruction to the jury:

For you to find . . . [D]efendant guilty of this particular crime the State has to prove four things to you beyond a reasonable doubt.

Number 1, that . . . [D]efendant engaged in a sexual act with a victim. As it applies to the facts of this case, ladies and gentlemen, a sexual act means any penetration, however slight, by any object into the genital or anal opening of a person's body.

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

The second thing the State has to prove to you: that at the time of the acts the victim was fourteen years old.

The third thing that the State has to prove to you, ladies and gentlemen: that at the time of the acts . . . [D]efendant was at least six years older than the victim—that . . . [D]efendant was six years older than the victim.

The fourth thing that they have to prove to you: that at the time of the acts . . . [D]efendant was not lawfully married to the victim. I believe that is conceded by both sides to be understood in this particular case, but that is an element of the crime.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date . . . [D]efendant engaged in a sexual act with the victim who was fourteen years of age, that . . . [D]efendant was at least six years older than the victim and that they were not married, it would be your duty to return a verdict of guilty.

Thus, the jury instruction allowed the jury to convict Defendant on a theory of statutory sex offense predicated on anal penetration.

The evidence at trial tended to show that JBS felt nothing out of the ordinary in her “private area” prior to arriving at Defendant’s house on 6 January 2007. Defendant drugged a pie which he served to Smith and JBS. Defendant then came into JBS’ room during the night and kissed her and touched her breasts. JBS testified that she felt Defendant’s hand go “down into [her] pants” and “up into [her] body.” JBS drifted in and out of consciousness and was under the influence of a chemical that causes anterograde amnesia. The next morning, she had a fresh anal laceration that was so sensitive that it caused her to cry out in pain when a doctor was examining the area. Taken in the light most favorable to the State, we find this evidence sufficient to support the trial court’s instruction on anal penetration. We therefore overrule this assignment of error.

Indictments

[5] Defendant next argues that the indictments for delivery of a controlled substance and contaminating food or drink with a controlled substance were fatally flawed. The indictment for delivery of a controlled substance to a minor charged Defendant with “delivering a controlled substance, BENZODIAZEPENES, which is included in Schedule IV of the North Carolina Controlled Substances Act, to

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

[JBS][.]” The indictment for contaminating food or drink with a controlled substance charged Defendant with “CONTAMINAT[ING] a Banana Cream Pie with a controlled substance, namely BENZODIAZEPINES, which is included in Schedule IV of the North Carolina Controlled Substances Act.” Defendant contends that, because “benzodiazepines” is not listed in Schedule IV of the North Carolina Controlled Substances Act, these indictments are fatally flawed and the convictions must be vacated. We agree.

A felony conviction must be supported by a valid indictment which sets forth each essential element of the crime charged. *State v. Westbrook*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996); *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981). A challenge to the facial validity of an indictment may be brought at any time, and need not be raised at trial for preservation on appeal. *Sturdivant*, 304 N.C. at 308, 283 S.E.2d at 729. Defendant relies on our opinions in *State v. Ahmadi-Turshizi*, 175 N.C. App. 783, 625 S.E.2d 604 (2006) and *State v. Ledwell*, 171 N.C. App. 328, 614 S.E.2d 412 (2005).

We begin by noting that “when an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant’s failure to contest its validity in the trial court.” *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208 (2001) (citations omitted). In *Ledwell*, our Court addressed the question of whether “the trial court lacked jurisdiction on [a] charge of felonious possession of a controlled substance because the indictment was facially insufficient in failing to allege a substance listed in Schedule I.” *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414. Discussing the requirements of a valid indictment, we noted that the “[i]dentity of a controlled substance allegedly possessed is . . . an essential element[.]” and must be set forth in order for an indictment to stand. *Id.*

Comparing the indictment in *Ledwell* with the language contained in Schedule I of the Controlled Substances Act, our Court noted: “In the case *sub judice*, the indictment alleged possession of ‘[m]ethylenedioxymphetamine (MDA), a controlled substance included in Schedule I of the North Carolina Controlled Substances Act.’ No such substance, however, appears in Schedule I.” *Id.* at 332, 614 S.E.2d at 415. We then conducted the following review of similar cases arising in other jurisdictions:

In a similar case, *United States v. Huff*, 512 F.2d 66 (5th Cir.1975), the defendant was charged with two crimes: distribution of “3,4

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

methylenedioxy amphetamine,” a controlled substance pursuant to a statutory schedule of controlled substances, and possession of “methylenedioxy amphetamine,” which was not listed on the statutory schedule of controlled substances. The Fifth Circuit stated that while “[t]he addition of the numbers ‘3,4’ would have indeed saved this count, . . . we cannot regard this defect as a mere technicality, for the chemical and legal definition of these substances is itself technical and requires precision.” *Id.* at 69. The Fifth Circuit held that the second count failed to charge an offense and reversed the defendant’s conviction. In contrast, in *Rogers v. State*, 599 So.2d 930 (Miss. 1992), the Supreme Court of Mississippi upheld an indictment that charged a defendant with distribution of “crystal methamphetamine.” Notably, however, the Mississippi controlled substance statute explicitly included as controlled substances “[a]ny substance which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers[.]” *Id.* at 933 (emphasis omitted) (quotation omitted). North Carolina’s Schedule I, in contrast, does not include any substance which contains any quantity of “methylenedioxyamphetamine (MDA).”

Id. at 332-33, 614 S.E.2d at 415. Our Court concluded that, because “the substance listed in [the d]efendant’s indictment does not appear in Schedule I of the North Carolina Controlled Substances Act[,] . . . the indictment must fail, and [the d]efendant’s conviction of felonious possession of ‘[m]ethylenedioxyamphetamine (MDA)[]’ [must be] vacated.” *Id.* at 333, 614 S.E.2d at 415. *See also Ahmadi-Turshizi*, 175 N.C. App. at 786, 625 S.E.2d at 606 (“As the substance listed in defendant’s indictment does not appear in Schedule I of our Controlled Substances Act, the indictment is fatally flawed and each of defendant’s convictions . . . must be vacated.”).

In the case before us, the challenged indictments contained the following language:

- I . The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully, and feloniously did

CONTAMINATE a Banana Cream Pie with a controlled substance, namely BENZODIAZEPINES, which is included in

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

Schedule IV of the North Carolina Controlled Substances Act, that was meant to render [Smith] physically helpless.

- II. And the jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully, and feloniously did

KNOWINGLY POSSESS with the intent to deliver or possess a controlled substance, namely BENZODIAZEPINES, as defined in G.S. 90-87(5) for the purpose of violating this section. G.S. 14-401.16(b)

And:

- I. The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully, and feloniously did

violate G.S. 90-95(a)(1) by delivering a controlled substance, BENZODIAZEPINES, which is included in Schedule IV of the North Carolina Controlled Substances Act to [JBS], a person under 16 years old but more than 13 years old, namely 14. The defendant was at least eighteen years old or older at the time of the offense.

...

- II. And the jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully, and feloniously did

contaminate Banana Cream Pie with a controlled substance, namely Benzodiazepines, which is included in Schedule IV of the North Carolina Controlled Substances Act, that was meant to render [JBS] physically helpless.

Schedule IV of the Controlled Substances Act is contained within N.C. Gen. Stat. § 90-92 (2009). N.C.G.S. § 90-92 contains language enumerating forty-nine “[d]epressants”; ten “[s]timulants”; two “[n]arcotic [d]rugs”; and six more chemicals either listed individually or under the heading: “Other [s]ubstances.” N.C.G.S. § 90-92. Not one of these categories, nor any of the enumerated substances, contains the term “benzodiazepines.”

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

In discussing the nature of benzodiazepines, Agent Joncich testified at trial that: “Benzodiazepines are a class of drugs with a similar chemical structure There’s well over twenty different [b]enzodiazepine type drugs.” He further stated that: “Most of the [b]enzodiazepines fall under Schedule IV of the North Carolina General Statutes.” Agent Joncich testified that “Clonazepam” is the generic name for a drug marketed as Klonopin, and that Clonazepam is a benzodiazepine.

The Attorney’s Dictionary of Medicine and Word Finder defines “benzodiazepines” as: “A group of drugs whose properties are somewhat similar to those of barbiturates but which are much superior. . . . The most familiar examples of this group are chlordiazepoxide (better known by the brand name Librium) and diazepam (brand name: Valium).” 1 J.E. Schmidt, MD, *Attorneys’ Dictionary of Medicine and Word Finder* B-70, B-71 (2008). The *Comprehensive Textbook of Psychiatry*, third edition, discusses “the benzodiazepine derivatives” as follows:

The first of the benzodiazepine derivatives, synthesized in 1957, was chlordiazepoxide. Six additional derivatives of that class are now available in the United States: diazepam, oxazepam, clorazepate, lorazepam, prazepam, and flurazepam. Other benzodiazepines are available on foreign markets and are undergoing study in the United States and elsewhere.

3 Harold I. Kaplan et al., *Comprehensive Textbook of Psychiatry/III* 2317 (3rd. Ed. 1980). Likewise, the Attorney’s Illustrated Medical Dictionary defines “benzodiazepine” as “the parent compound of a group of widely prescribed minor tranquilizers used to treat anxiety and neuroses.” Ida G. Dox, Ph.D., et al., *Attorney’s Illustrated Medical Dictionary* B9 (1997). Thus, the term “benzodiazepine” describes a class of drug which encompasses a number of individual drugs. There is not a drug called simply “benzodiazepine;” rather, there exist several drugs, including Clonazepam, Diazepam, Pramazepam and others, all of which fall within the class of benzodiazepines.

The State argues that the indictment was not fatally flawed because, though “benzodiazepines” does not appear in Schedule IV, an indictment must merely “apprise[] . . . [D]efendant of the charge against him with enough certainty to allow him to prepare his defense[.]” The State relies on *State v. Newton*, 21 N.C. App. 384, 204 S.E.2d 724 (1974). In *Newton*, our Court held that an indictment was sufficient even though it charged a defendant with possession of

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

“Desoxyn[,]” which was a substance not listed in the controlled substances act. *Newton*, 21 N.C. App. at 386, 204 S.E.2d at 725-26. Under the facts of *Newton*, our Court held that the indictment was sufficient because “Desoxyn” and “Methamphetamine” were “the same thing.” *Id.* at 386, 204 S.E.2d at 725. We noted that:

Each of the Schedules of the Controlled Substances Act provides that it “includes the controlled substance listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated.” We take notice that Desoxyn is a trade name used by Abbott Laboratories, North Chicago, Illinois, for methamphetamine hydrochloride.

Id.

The State contends that “in essence, [b]enzodiazepines and Clonazepam are the same thing. At the very least, [b]enzodiazepines is a ‘common’ name for Clonazepam.” We disagree. In essence, Clonazepam is a benzodiazepine. However, not all benzodiazepines are Clonazepam. For example, Diazepam is marketed under the name “Valium” and Clonazepam is marketed under the name “Klonopin.” *See Physician’s Desk Reference (PDR)* 2880 (64th ed. 2010); *PDR* 2855. These are not the same drug, and there are significant chemical differences between the two. *See Id.* However, both Diazepam and Clonazepam are benzodiazepines. *PDR* 2880 (“Valium (diazepam) is a benzodiazepine derivative.”); *PDR* 2855 (“Klonopin, a benzodiazepine, is available[.]”). Thus, “benzodiazepines” is *not* a common name for Clonazepam, nor are benzodiazepines and Clonazepam the same thing.

Further, we note that not all benzodiazepines are listed under Schedule IV. As Agent Joncich testified at trial: “*Most* of the Benzodiazepines fall under Schedule IV of the North Carolina General Statutes.” (Emphasis added). Agent Joncich did not testify that all benzodiazepines were listed in Schedule IV. For example, we note that “phenazepam” is not listed among the sixty-seven enumerated substances listed in Schedule IV under N.C.G.S. § 90-92. However, according to the U.S. Department of Justice Drug Enforcement Administration, phenazepam is a benzodiazepine. *See DEA Microgram Bulletin*, Volume 42, Number 12, December 2009, 94 (discussing recovery of “phenazepam (a benzodiazepine)” on a sheet of paper suspected to contain LSD). Thus, it appears that there exist benzodiazepines which are not regulated under Schedule IV of the Controlled Substances Act.

STATE v. LePAGE

[204 N.C. App. 37 (2010)]

In the case before us, the indictments charged Defendant with certain crimes involving “BENZODIAZEPINES, which is included in Schedule IV of the North Carolina Controlled Substances Act[.]” Pursuant to our review above, we note first that the word “BENZODIAZEPINES” is not listed among any of the sixty-seven substances listed in Schedule IV. Further, there exist derivatives of the benzodiazepine category of drugs that are not listed under Schedule IV. Therefore, the indictment was flawed in that it: (1) incorrectly stated that “benzodiazepines” is listed under Schedule IV; and (2) charged Defendant with crimes involving the use of a category of substances, some of which are not regulated under Schedule IV. For reasons detailed above, we cannot agree with the State’s argument that “benzodiazepines” is “essentially the same thing as [C]lonazepam.” We therefore find that the indictments for the charges involving benzodiazepines are defective, and, as in *Ledwell*, “we cannot regard this defect as a mere technicality, for the chemical and legal definition of these substances is itself technical and requires precision.” *Ledwell*, 171 N.C. App. at 332-33, 614 S.E.2d at 415.

We are bound by the principle established under *Ledwell* and *Ahmadi-Turshizi*, that “when an indictment fails to list a controlled substance by its chemical name as it appears in [the relevant Schedule of the North Carolina Controlled Substances Act], the indictment must fail.” *Ahmadi-Turshizi*, 175 N.C. App. at 785, 625 S.E.2d at 605 (citing *Ledwell*, 171 N.C. App. at 333, 614 S.E.2d at 415). Because an invalid indictment deprives a trial court of jurisdiction to try a defendant, we must vacate the convictions based on the indictments for delivery of a controlled substance and contamination of food or drink with a controlled substance. *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981) (“When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority.”).

Plain Error/Ineffective Counsel

Defendant next argues that the trial court erred in instructing the jury regarding the contamination of the pie. Because we have found the indictment on this issue to be fatally flawed, we need not address this argument.

No error in 07 CRS 50108 and 07 CRS 50111.

HIGH ROCK LAKE PARTNERS, LLC v. N.C. DEP'T OF TRANSP.

[204 N.C. App. 55 (2010)]

Vacated in 07 CRS 50110 and 07 CRS 50114.

Judges STEELMAN and BEASLEY concur.

HIGH ROCK LAKE PARTNERS, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY,
PETITIONER v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION,
RESPONDENT

NO. COA09-95

(Filed 18 May 2010)

1. Appeal and Error— interlocutory order—denial of motion to intervene or be joined as party—Rule 54(b) certification—substantial right

Although N.C.G.S. § 1A-1, Rule 54(b) certification did not provide the Court of Appeals with jurisdiction over this appeal since the case did not involve a final judgment as to any claim or party, the trial court's denial of an individual's motion to intervene or be joined as a party affected a substantial right that would be lost absent immediate appellate review because petitioner no longer owned the pertinent property and had no reason to pursue the case on remand. Further, petitioner's continued pursuit of this case could be dismissed as moot.

2. Parties— motion to intervene or be joined as party—real party in interest

The trial court erred by denying the current property owner's motion to intervene or be joined as a party in a case regarding DOT's denial of an application for a driveway permit. The trial court's failure to join the real party in interest before addressing the merits required the order to be set aside and remanded for an order joining the property owner as a party, and for reconsideration of the petition for judicial review.

Appeal by John M. Dolven, M.D. from order entered 26 August 2008 by Judge Forrest Donald Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 August 2009.

HIGH ROCK LAKE PARTNERS, LLC v. N.C. DEP'T OF TRANSP.

[204 N.C. App. 55 (2010)]

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, for John M. Dolven, M.D., appellant.

Attorney General Roy Cooper, by Assistant Attorney General James M. Stanley, Jr. and Assistant Attorney General Scott K. Beaver, for respondent-appellee.

GEER, Judge.

John M. Dolven, M.D. (“Dolven”) appeals from the trial court’s order entered in this action commenced by High Rock Lake Partners, LLC (“High Rock”) against the North Carolina Department of Transportation (“DOT”). Dolven’s appeal from that order, in which the trial court denied Dolven’s motion to intervene or be joined as a party and remanded the matter to the DOT for further proceedings, is interlocutory. Only the denial of Dolven’s motion to intervene or be joined as a party is properly before this Court, and as to that issue, we believe that a substantial right will be affected absent immediate appellate review. Because Dolven, as the current owner of the property for which the permit at issue is sought, is the real party in interest, we reverse the trial court’s denial of his motion to be joined as a party.

With respect to the merits of the trial court’s order, because Dolven was not a party to the action below, he lacks standing to appeal the trial court’s rulings on the merits of High Rock’s petition. Nevertheless, since the trial court did not join the real party in interest—Dolven—before addressing the merits, we must set aside the order and remand for an order joining Dolven as a party and for reconsideration of the petition for judicial review.

Facts

High Rock is a real estate development company based in Mecklenburg County, North Carolina. On 12 August 2005, HCL Partnership, LLP, the predecessor entity to High Rock, bought a parcel of land totaling approximately 188 acres near High Rock Lake in Davidson County, North Carolina for \$5,200,000.00. Financing for the purchase price was secured by three deeds of trust, including a first deed of trust held by Dolven.

The property is located on a peninsula jutting out into High Rock Lake, which is situated to the south and east of a railroad crossing. The only means of ingress and egress onto the peninsula from the mainland is by way of a 14-foot-wide road that runs across the rail-

HIGH ROCK LAKE PARTNERS, LLC v. N.C. DEP'T OF TRANSP.

[204 N.C. App. 55 (2010)]

road tracks. That road is SR 1135 and is part of the North Carolina highway system maintained by the DOT. North Carolina Railroad Company ("NCRC") owns an easement over the railroad crossing subject to the DOT's right of way on SR 1135. Norfolk Southern ("Norfolk"), which manages the railroad crossing and rail lines for NCRC, operates a regional hump station on the north and west side of the railroad crossing.

On 9 September 2005, High Rock submitted an application to Davidson County for preliminary plat approval of a 60-home subdivision to be developed on the property. On 20 September 2005, the Davidson County Planning and Zoning Board ("the Planning Board") conducted a meeting regarding the preliminary plat. Representatives from Norfolk appeared at the meeting to voice their opposition to the development, questioning the safety of the railroad crossing on SR 1135 located 1/4 mile from the proposed entrance to the development.

On 4 October 2005, the Planning Board met to consider approval of the preliminary plat. At the meeting, DOT representative Danny Gilbert voiced the DOT's opposition to the development. Gilbert recommended that the County require High Rock to build a bridge or grade separation at the railroad crossing due to safety issues resulting from (1) the high speed and number of trains crossing the location, (2) the hump station causing blocking of the crossing, and (3) the increased traffic on SR 1135 because of the proposed development. A representative from Norfolk also opposed the development, citing safety concerns related to trains blocking the crossing, train horn noise, and the potential for increased trespassers at the hump station. The Planning Board subsequently voted to deny the preliminary plat.

High Rock appealed the decision to the Davidson County Board of Commissioners, which conducted a public hearing on the appeal on 7 November 2005. At the hearing, DOT representatives and Norfolk again spoke in opposition to the development, with the DOT recommending that County approval of the plat be conditioned on High Rock building a bridge at the railroad crossing. On 12 December 2005, the Board of Commissioners reconvened the public hearing and approved the preliminary plat based on High Rock's meeting all of the County's requirements for subdivision approval.

On 6 October 2005, High Rock submitted to the DOT a driveway permit application seeking to extend the end of SR 1135 in order to create an access to the development. On 12 December 2005, the DOT

HIGH ROCK LAKE PARTNERS, LLC v. N.C. DEP'T OF TRANSP.

[204 N.C. App. 55 (2010)]

sent High Rock a letter informing it that the driveway permit application had been denied because SR 1135 was too narrow to accommodate additional traffic from the development, and the parties could not agree as to any widening improvements.

On 11 January 2006, High Rock appealed the DOT's initial decision to deny the driveway permit to Pat Ivey, the DOT Division Engineer. On 3 March 2006, Ivey approved the driveway permit subject to certain conditions. In essence, Ivey ruled that High Rock was required to widen the railroad crossing to allow safe passage of two-way traffic on the road. Ivey said this would require High Rock to (1) "[o]btain all required licenses and approvals from the owning railroad, NCR, to widen the crossing and approaches on their right of way"; and (2) "[o]btain all necessary agreements and approvals from the operating railroad, Norfolk Southern Railway Company (NSR), necessary to revise and acquire the automatic flashers, gates and enhanced devices that will enable the crossing to remain at the current 'Sealed Corridor' level of safety consistent with the USDOT designation of the corridor for development of high-speed intercity passenger rail service." Ivey directed that "[a]ll expenses and costs associated with the subject improvements shall be borne by the applicant."

On 30 March 2006, High Rock appealed Ivey's decision to the DOT Driveway Permit Appeals Committee. On 12 June 2006, the Appeals Committee upheld the conditions set forth in Ivey's letter. On 12 July 2006, High Rock filed a petition for judicial review in Davidson County Superior Court. The trial court dismissed High Rock's petition with prejudice on 13 September 2007, and on 17 September 2007, High Rock re-filed its petition in Mecklenburg County Superior Court.

On 20 June 2008, High Rock and Dolven filed a motion to join Dolven as a party petitioner to the action. The motion explained that Dolven had acquired the property in a foreclosure proceeding and that High Rock had assigned to Dolven its rights to seek the driveway permit and pursue the appeal of the denial of the permit. The motion contended that "Dolven is a real party in interest and/or a necessary party to this action." High Rock and Dolven also argued that "Dolven's interests as the owner of the Property are different than Petitioner's and not, therefore, adequately represented by the existing Petitioner." Dolven moved in the alternative for an order allowing him to intervene in the action.

HIGH ROCK LAKE PARTNERS, LLC v. N.C. DEP'T OF TRANSP.

[204 N.C. App. 55 (2010)]

The trial court entered an order on 24 July 2008 and an amended order on 26 August 2008 in which it denied the motion for joinder/intervention. The court explained that “High Rock’s attempt to assign its claim for relief to Dr. Dolven is contrary to the anti-assignment provisions of G.S. § 143B-426.40A(b) and that, pursuant to that statute, any attempt to assign this claim to Dr. Dolven is void.”

The court concluded that the portion of the Final Agency Decision that conditioned receipt of the driveway permit on High Rock’s obtaining licenses and approvals from the owning and operating railroads was an unlawful delegation of the determination of the permit application. It reasoned that such a condition unlawfully left to the discretion of the railroads the decision whether or not the necessary licenses and approvals would be issued. The court, therefore, ordered those conditions stricken and remanded the case to the Appeals Committee “for purposes of entering an amended order that determines whether or not to issue a Driveway Permit with respect to this property and, if such Permit is to issue, to determine and specify what, if any[,] conditions are to be attached to the issuance of the Permit.” The trial court stated: “Any conditions specified must be articulated by the agency issuing the decision and not left to the discretion of any third party.”

The trial court authorized the Appeals Committee on remand to consider additional evidence as necessary to determine what could reasonably be required of High Rock by the railroads and to specify those requirements as conditions of the permit. The court stated:

The Court’s intent is that, at the hearing upon remand, the Committee should consider all pertinent evidence, including evidence of what improvements need to be made for a safe crossing. The Committee would then have authority to deny the application, grant the application without conditions, or grant the application subject to whatever conditions Respondent determines necessary, but the conditions cannot be contingent upon approval of any third party. In other words, whatever steps are necessary to complete the process need to be fully investigated and determined during the hearing process with the Committee.

The court then held that “[a]s to all other aspects of the case, the Court is ruling in favor of the Department.” The court concluded: “This matter be, and hereby is, remanded to the Department for consideration, consistent with this Court’s order, of whether to deny the Application for Driveway Permit, grant the Application, or grant the

HIGH ROCK LAKE PARTNERS, LLC v. N.C. DEP'T OF TRANSP.

[204 N.C. App. 55 (2010)]

Application conditioned upon the satisfaction of any lawfully specified conditions, but any conditions imposed must be determined by and specified with particularity by the Department rather than by a third party[.]”

Finally, the trial court stated that it was certifying its order for immediate review under Rule 54(b), explaining:

In making this certification, this Court fully recognizes that it ultimately will be for the appellate courts to determine whether or not this order constitutes a final order. It is the intent of this court, however, that this order operates as a final determination of the issues of the statutory authority of the Department of Transportation to require improvements at the railroad crossing in connection with the issuance of the permit and the unlawful delegation of decision making authority to a third party.

Dolven gave notice of appeal on 15 September 2008.

Discussion

[1] As an initial matter, we must address the interlocutory nature of the trial court's order, as it presents a jurisdictional issue. *Akers v. City of Mount Airy*, 175 N.C. App. 777, 778, 625 S.E.2d 145, 146 (2006). “An interlocutory order . . . is one made during the pendency of an action which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993). In this case, although the trial court purported to make a final ruling on certain legal arguments, because it remanded for further proceedings, the order did not fully dispose of the case.

Akers involved an almost identical situation. In *Akers*, 175 N.C. App. at 778, 625 S.E.2d at 146, the trial court entered an order on a petition for judicial review of an annexation ordinance that resolved various issues raised in the petition, but also remanded the matter to the Board of Commissioners for further proceedings. In dismissing the appeal as interlocutory, this Court observed: “[T]his Court has consistently held that an order by a superior court, sitting in an appellate capacity, that remands to a municipal body for additional proceedings is not immediately appealable. *See, e.g., Heritage Pointe Builders, [Inc. v. N.C. Licensing Bd. of Gen. Contractors]*, 120 N.C. App. [502,] 504, 462 S.E.2d [696,] 698 (1995) (appeal of superior court's remand to a licensing board for rehearing dismissed as inter-

HIGH ROCK LAKE PARTNERS, LLC v. N.C. DEP'T OF TRANSP.

[204 N.C. App. 55 (2010)]

locutory); *Jennewein v. City Council of the City of Wilmington*, 46 N.C. App. 324, 326, 264 S.E.2d 802, 803 (1980) (appeal of superior court's remand to a city council for a *de novo* hearing dismissed as interlocutory).” *Akers*, 175 N.C. App. at 779-80, 625 S.E.2d at 146-47.

Under *Akers*, *Heritage Pointe*, and *Jennewein*, this appeal is, therefore, interlocutory. An interlocutory order may be immediately appealed in only two circumstances: (1) when the trial court, pursuant to N.C.R. Civ. P. 54(b), enters a final judgment as to one or more but fewer than all of the claims or parties and certifies that there is no just reason to delay the appeal; or (2) when the order deprives the appellant of a substantial right that would be lost absent appellate review prior to a final determination on the merits. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

The trial court, in this case, included language in the order purporting to certify it for immediate appeal under Rule 54(b). The appellate courts are not, however, bound by a trial court's determination that Rule 54(b) applies. *See Dep't of Transp. v. Olinger*, 172 N.C. App. 848, 851, 616 S.E.2d 672, 675 (2005) (explaining that “the trial court's determination that “there is no just reason to delay the appeal,” while accorded great deference, cannot bind the appellate courts because “ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court”” (quoting *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998))).

Our courts have stressed that “a Rule 54(b) certification is ineffective to certify an otherwise interlocutory appeal *only* if the trial court has entered a final judgment with regard to a party or a claim in a case which involves multiple parties or multiple claims.” *CBP Res., Inc. v. Mountaire Farms of N.C., Inc.*, 134 N.C. App. 169, 171, 517 S.E.2d 151, 153-54 (1999) (emphasis added). The order in this case does not involve, as required by Rule 54(b), a final judgment as to any claim or party. *See Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (cautioning that “the trial court may not, by certification, render its decree immediately appealable if ‘[it] is not a final judgment’” (quoting *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983))); *Cook v. Export Leaf Tobacco Co.*, 47 N.C. App. 187, 189, 266 S.E.2d 754, 756 (1980) (“The court did make a finding that Cook ‘shall be entitled to appeal’ which might comply with the Rule's requirement that the court determine ‘there is no

HIGH ROCK LAKE PARTNERS, LLC v. N.C. DEP'T OF TRANSP.

[204 N.C. App. 55 (2010)]

just reason for delay.’ However, the judgment is not final which is also a requirement for appealability under Rule 54(b).”). Since the order in this case did not involve a final judgment as to any claim or party, Rule 54(b) does not provide this Court with jurisdiction over this appeal.

We believe, however, that the trial court’s denial of Dolven’s motion to intervene or be joined as a party affects a substantial right that would be lost absent appellate review prior to a final determination on the merits. We acknowledge that, ordinarily, an appeal of an order denying a motion to intervene or be joined should be dismissed as interlocutory because “such challenges may be asserted after a final judgment on all the claims without prejudice.” *Nello L. Teer Co. v. Jones Bros., Inc.*, 182 N.C. App. 300, 306, 641 S.E.2d 832, 837 (2007). Here, however, the particular procedural posture of this case is such that we are convinced a substantial right will be lost without immediate review. *See United Servs. Auto. Ass’n v. Simpson*, 126 N.C. App. 393, 395, 485 S.E.2d 337, 339 (explaining that this Court will review interlocutory order if appellant demonstrates “the order adversely affects a substantial right which appellant may lose if not granted an appeal before final judgment”), *disc. review denied*, 347 N.C. 141, 492 S.E.2d 37 (1997).

High Rock no longer owns the property for which the permit is sought. It, therefore, has no reason to pursue the permit on remand from the trial court. Moreover, High Rock’s continued pursuit of the permit could well be dismissed as moot. *See Messer v. Town of Chapel Hill*, 346 N.C. 259, 261, 485 S.E.2d 269, 270 (1997) (holding plaintiff’s sale of property to third party rendered moot his challenge to constitutionality of re-zoning decision). Because of these circumstances, it is possible that there may never be a final judgment entered in this case.

“Our jurisprudence regarding the substantial right analysis is not defined by fixed rules applicable to all cases of a certain type, but rather is based on an individual determination of the facts and procedural context presented by each case.” *Boyce & Isley, PLLC v. Cooper*, 169 N.C. App. 572, 574-75, 611 S.E.2d 175, 176 (2005). As this may be Dolven’s only chance for review of the denial of his motion for joinder/intervention, we conclude his appeal is properly before us. *See Council v. Town of Boone Bd. of Adjustment*, 146 N.C. App. 103, 104, 551 S.E.2d 907, 908 (addressing merits of denial of motion to intervene in connection with application for conditional use permit

HIGH ROCK LAKE PARTNERS, LLC v. N.C. DEP'T OF TRANSP.

[204 N.C. App. 55 (2010)]

although appeal interlocutory), *disc. review denied*, 354 N.C. 360, 560 S.E.2d 130 (2001).

[2] Turning to the merits of the trial court's decision on the intervention/joiner motion, we first address the trial court's determination that Dolven should not be made a party to this action because High Rock's assignment to Dolven of the right to pursue the permit was invalid under N.C. Gen. Stat. § 143B-426.40A(b) (2009). N.C. Gen. Stat. § 143B-426.40A(b) provides:

Except as otherwise provided in this section, any assignment of a claim against the State is void, regardless of the consideration given for the assignment, unless the claim has been duly audited and allowed by the State and the State has issued a warrant for payment of the claim. Except as otherwise provided in this section, the State shall not issue a warrant to an assignee of a claim against the State.

After Dolven purchased the property, High Rock and Dolven entered into an agreement that provided:

To the extent allowed by law, for good and valuable consideration, HIGH ROCK LAKE PARTNERS, LLC does hereby assign, to JOHN DOLVEN, except as reserved below, its rights of appeal set forth in the Petition for Judicial Review ("Petition") with the North Carolina Department of Transportation, et al as Respondents, filed in Mecklenburg County Superior Court on September 17, 2007, being File No. 07 CVS 18706, along with any and all rights and claims of ownership to the driveway permit application identified as Exhibit "I" to the Petition; the driveway permit, or decisions related thereto, being appealed identified as Exhibit "S" to the Petition; and any and all rights to receive governmental approvals, including a driveway permit, for the development identified in paragraph #10 of the Petition as 60 single family residential lots off SR 1135 on the Property described in Deed Book 1634, at Page 695, Davidson County Registry. The parties agree that High Rock Lake Partners, LLC reserves the right to remain a party in the Petition case in the event that an assignment of any of the foregoing approvals is not allowed under any applicable law and in order to protect its interests and standing in the damages case referenced below. Notwithstanding, the parties agree that Dolven have [sic] the sole and exclusive discretion in deciding any future use or sale of the property in question, including all rights to retain any profits associated therewith.

HIGH ROCK LAKE PARTNERS, LLC v. N.C. DEP'T OF TRANSP.

[204 N.C. App. 55 (2010)]

Whether this assignment is barred by N.C. Gen. Stat. § 143B-426.40A(b) depends on whether the subject of High Rock's assignment is a "claim against the State."

As this is a question of statutory interpretation, we review this argument *de novo*. *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998) ("A question of statutory interpretation is ultimately a question of law for the courts."). The statute does not specifically define "claim against the State" except to provide that it includes a part or interest in a claim. N.C. Gen. Stat. § 143B-426.40A(a)(2). It is, however, fundamental that "statutory interpretation requires the plain meaning of the statute to control its applicability." *Univ. of N.C. at Chapel Hill v. Feinstein*, 161 N.C. App. 700, 704, 590 S.E.2d 401, 403 (2003), *disc. review denied*, 358 N.C. 380, 598 S.E.2d 380 (2004).

Generally, a "claim" is defined as "[t]he assertion of an existing right; any right to payment or to an equitable remedy" or "[a] demand for money, property, or a legal remedy to which one asserts a right. . . ." Black's Law Dictionary 281-82 (9th ed. 2004). The manner in which the phrase "claim against the State" is used in § 143B-426.40A(b) comports with such a definition of "claim" as an entitlement to a legal remedy. The statute specifies that any assignment of a claim against the State is void "unless the claim has been duly audited and *allowed* by the State and the State has issued a warrant for *payment* of the claim." N.C. Gen. Stat. § 143B-426.40A(b) (emphasis added). Similarly, the statute defines "[a]ssignment" as "[a]n assignment or transfer of a claim, or a power of attorney, an order, or *another authority for receiving payment of a claim*." N.C. Gen. Stat. § 143B-426.40A(a)(1) (emphasis added).

The two cases cited by DOT in its brief—the only authority construing N.C. Gen. Stat. § 143B-426.40A(b) or its predecessor—also indirectly support this construction. In *Ledbetter Bros., Inc. v. N.C. Dep't of Transp.*, 68 N.C. App. 97, 100-01, 314 S.E.2d 761, 763 (1984), this Court held that a "hold harmless" clause did not constitute an assignment under § 143B-426.40A(b). Even though a subcontractor had agreed to "hold harmless" a general contractor if the DOT declined a claim by the general contractor based on the subcontractor's work, the Court held that the general contractor could sue the DOT for funds withheld based on the subcontractor's work. *Id.* The Court reasoned that the "hold harmless" agreement had not transferred anything to the general contractor, and no payment had been made to the general contractor that would preclude it from pursuing

HIGH ROCK LAKE PARTNERS, LLC v. N.C. DEP'T OF TRANSP.

[204 N.C. App. 55 (2010)]

its own claim for relief since it remained unpaid. *Id.* at 101-02, 314 S.E.2d at 765.

In contrast, in *Bolton Corp. v. State*, 95 N.C. App. 596, 598, 383 S.E.2d 671, 672 (1989), *disc. review denied*, 326 N.C. 47, 389 S.E.2d 85 (1990), the other case cited by the DOT, a subcontractor assigned its claim for damages against the State to the prime contractor and the prime contractor brought suit. On appeal, this Court affirmed the trial court's ruling that the subcontractor's assignment of its claim for damages was void under the anti-assignment statute. *Id.* at 599, 383 S.E.2d at 673.

Neither of these cases explicitly discusses what constitutes a "claim against the State." Both cases, however, assumed that an assignment falling within the scope of N.C. Gen. Stat. § 143B-426.40A(b) would involve the transfer of a claim for legal relief—more specifically, a claim for payment of monetary damages—that would be sought in an adjudicative forum. High Rock's application to obtain a driveway permit and subsequent appeal from the denial is not a demand for payment or other legal remedy from the DOT. Instead, High Rock was seeking appellate review of a decision made by the DOT in an administrative capacity. In fact, the assignment agreement specified that High Rock reserved the right to remain a party in the action to protect its claim to monetary damages. We hold, therefore, that High Rock did not assign a "claim against the State"—within the meaning of the anti-assignment statute—to Dolven, and its assignment was, therefore, not void on that ground.

Since N.C. Gen. Stat. § 143B-426.40A(b) is inapplicable, we must determine whether Dolven was otherwise entitled to be joined or to intervene as a party. One of the bases for the motion was Rule 17(a) of the Rules of Civil Procedure, which requires that "[e]very claim shall be prosecuted in the name of the real party in interest"¹ "The real party in interest is the party who by substantive law has the legal right to enforce the claim in question." *Whittaker v. Furniture Factory Outlet Shops*, 145 N.C. App. 169, 175, 550 S.E.2d 822, 825 (2001) (quoting *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 19, 234 S.E.2d 206, 209, *disc. review denied*, 293 N.C. 159, 236 S.E.2d 704 (1977)). Thus, the real party in interest is "a party who is benefitted or injured by the judgment in the case." *Id.* (quoting *Reliance Ins. Co.*, 33 N.C. App. at 19, 234 S.E.2d at 209).

1. The DOT does not address the applicability of Rule 17 in its brief on appeal.

HIGH ROCK LAKE PARTNERS, LLC v. N.C. DEP'T OF TRANSP.

[204 N.C. App. 55 (2010)]

Here, it is undisputed that Dolven is now the owner of the property, and High Rock no longer has any interest in that property. Only Dolven, as the owner, would benefit from a decision by the DOT allowing a driveway permit. High Rock has assigned all of its rights in the driveway permit application to Dolven, and Dolven has exclusive discretion to decide how to use the property. The DOT has not argued, apart from N.C. Gen. Stat. § 143B-426.40A(b), that this assignment of the driveway permit application is necessarily improper. Dolven is the only party who will be benefitted or injured by the decision on appeal in this case and is, therefore, the real party in interest. See *Land v. Tall House Bldg. Co.*, 150 N.C. App. 132, 133, 563 S.E.2d 8, 9 (2002) (holding that insurance carrier for defendant contractor was real party in interest as to third party claim against stucco manufacturer when plaintiff homeowners assigned their right to sue for defects in their house to insurance carrier).

Rule 17(a) makes plain that the trial court should not have addressed the merits of the case without first allowing the real party in interest to be joined. It provides: “No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest[.]” In *Daniel v. Wray*, 158 N.C. App. 161, 167, 580 S.E.2d 711, 716 (2003), this Court held that pursuant to this language, when an action has not been brought by the real party in interest, the trial court should, before ruling on the merits of an action, “either grant[] a continuance to permit [the real party in interest’s] joinder or correct[] the defect *ex mero motu*.”

As in *Daniel*, where the trial court erred in ruling on the merits before permitting joinder, the trial court, in this case, erred in addressing the merits without first joining Dolven as a party.² We cannot find this failure to join Dolven harmless because, since High Rock will not benefit if the driveway permit is allowed, there is no guarantee that High Rock will pursue the permit on remand or that the DOT would allow High Rock, a non-owner, to proceed with the application. See *Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978) (holding that failure to join necessary party was prejudicial). Accordingly, we reverse and remand so that Dolven can be added as the real party in interest. See *Richland Run Homeowners Ass’n v. CHC Durham Corp.*, 123 N.C. App. 345, 353, 473 S.E.2d 649, 655

2. Because of this holding, we need not address Dolven’s arguments regarding intervention.

HIGH ROCK LAKE PARTNERS, LLC v. N.C. DEP'T OF TRANSP.

[204 N.C. App. 55 (2010)]

(1996) (Greene, J., dissenting) (concluding that under Rule 17, trial court should have either corrected plaintiff's error by joining real party in interest or refused to rule on merits until real party in interest was substituted for plaintiff, and reversing and remanding "to give the real party in interest an opportunity to join or be substituted as a party plaintiff"), *adopted per curiam*, 346 N.C. 170, 484 S.E.2d 527 (1997).

Only after Dolven is joined should the trial court decide the merits of the petition for judicial review. Dolven, however, urges this Court to go ahead and address the substantive issues raised in its appellant's brief regarding the order below. Dolven, the sole person bringing this appeal, was not, however, a party below.

In *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000), this Court held that the Attorney General, who had represented the State in a class action, could not himself appeal the trial court's award of attorney's fees to counsel for the class, because the Attorney General was not a party. The Court explained that "[i]n order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure." *Id.* Because those requirements are "jurisdictional," "failure to follow the rule's prerequisites mandates dismissal of an appeal." *Id.*

The Court observed:

Rule 3 specifically designates that "any *party* entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal." More specifically, only a "party aggrieved" may appeal a trial court order or judgment, and such a party is one whose rights have been directly or injuriously affected by the action of the court.

A careful reading of Rule 3 reveals that its various subsections afford no avenue of appeal to either entities or persons who are nonparties to a civil action. Therefore, as we have already determined that the Attorney General is not a party to the case *sub judice*, we can find no grounds on which to allow his appeal. Accordingly, as presented, it must be dismissed.

Id. (internal citations omitted). *See also In re Brownlee*, 301 N.C. 532, 546, 272 S.E.2d 861, 869 (1981) ("One who is not a party to an action

STATE v. BREWINGTON

[204 N.C. App. 68 (2010)]

or who is not privy to the record is not entitled to appeal from the judgment of a lower court.”).

Because Dolven was not a party below, he cannot appeal the trial court’s ruling on the merits of High Rock’s action. The decision below is, therefore, vacated, and this matter is remanded for further proceedings in accordance with this opinion.

Vacated and remanded.

Judges ROBERT C. HUNTER and STEELMAN concur.

STATE OF NORTH CAROLINA v. JOHN EDWARD BREWINGTON

No. COA09-956

(Filed 18 May 2010)

Constitutional Law— right to confront witnesses—report of drug test

The trial court erred by admitting over defendant’s constitutional objection testimony from an SBI agent about a drug analysis performed by another agent. The witness’s determination that she would have come to the same conclusion as the testing analyst was not an independent expert opinion arising from the observation and analysis of raw data; defendant could only hope to attack on cross-examination pure assumptions about whether procedures were properly followed during the testing process. The evidence was prejudicial because the only other evidence concerning the substance found was the officer’s testimony that he believed it to be cocaine.

Appeal by defendant from judgment entered 13 February 2009 by Judge Arnold O. Jones, II, in Wayne County Superior Court. Heard in the Court of Appeals 10 December 2009.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Bradley Dawson, for the State.

Lucas & Ellis, PLLC, by Anna S. Lucas, for defendant appellant.

STATE v. BREWINGTON

[204 N.C. App. 68 (2010)]

HUNTER, JR., Robert N., Judge.

Defendant John Edward Brewington (“defendant”) appeals from a judgment finding him guilty of possessing cocaine. Defendant argues on appeal that the trial court erred by allowing the State’s expert forensic chemist to offer an opinion as to the composition of the contraband substance in issue because the testifying expert was not the expert that conducted the analysis of the substance. After careful review, we hold that the expert testimony should have been excluded, and award defendant a new trial.

I. BACKGROUND

On 1 December 2008, a grand jury returned a true bill of indictment against defendant charging him with possession of a controlled substance. Defendant pled not guilty, and the trial commenced on 12 February 2009.

The State’s evidence tended to show that on 18 January 2008, defendant was stopped on the street by Officer James Serlick of the Goldsboro Police Department for riding a bicycle with no reflective lights. Officer Serlick advised defendant that it was unlawful to operate a bicycle without reflectors, and asked if defendant would consent to being searched. Defendant consented, and during the course of the search, a napkin fell out of one of defendant’s socks. Officer Serlick testified that when he looked inside the napkin, he discovered an “offwhite rock like substance, what [he] believed to be cocaine.” Officer Serlick testified that he placed defendant under arrest for possession of a controlled substance, and transported him to the magistrate’s office. After delivering defendant to the jail, Officer Serlick completed the necessary paperwork and secured the “rock like substance” in the police department evidence locker.

Officer Robert Smith, an evidence technician at the Goldsboro Police Department, testified that he and another officer later retrieved the evidence placed in the locker and packaged it to be sent to the State Bureau of Investigation (“SBI”) for analysis. Officer Smith testified that he received the evidence back from the SBI on 9 May 2008, along with the written results of the analysis conducted by the SBI.

SBI Special Agent Kathleen Schell was tendered as an expert witness in forensic chemistry, and testified regarding the testing of the “offwhite rock like substance.” Defendant objected to the testimony of Special Agent Schell on Sixth Amendment grounds, and argued

STATE v. BREWINGTON

[204 N.C. App. 68 (2010)]

that the testimony should be excluded because Special Agent Schell was not the expert that actually conducted the testing. Defendant contended that he was entitled to cross-examine the testing expert under the Confrontation Clause. The trial court allowed an extensive *voir dire* of Special Agent Schell, but declined to rule on defendant's motion. Thereafter, the jury was brought back into the courtroom, and after further direct examination by the State, the trial court qualified Special Agent Schell as an expert in forensic chemistry. Court was then recessed until the following morning.

On 13 February 2009, the trial court opened proceedings with further *voir dire* of Special Agent Schell. After hearing final arguments from each side, the trial court denied defendant's motion, citing *State v. Delaney*, 171 N.C. App. 141, 613 S.E.2d 699 (2005); *State v. Jones*, No. COA03-976, 2004 N.C. App. LEXIS 1655, 2004 WL 1964890 (N.C. Ct. App., Sept. 7, 2004) (unpublished); and *State v. Huffstetter*, 312 N.C. 92, 322 S.E.2d 110 (1984). Applying these cases, the trial court ruled that admitting Special Agent Schell's testimony did not violate the Confrontation Clause of the Sixth Amendment.

After testifying in detail about routine SBI lab procedures, Special Agent Schell offered the following testimony.

Q. And who, according to the information that you located in the computer, who analyzed the sample containing State's Exhibit 1B?

A. Nancy Gregory.

....

Q. And according to the lab notes, if you'll just right now list them. What types of tests were performed on this sample?

A. There were two preliminary color tests, a preliminary crystal test and a more specific instrumental analysis test that was conducted on this piece of evidence.

....

Q. And from the notes that you retrieved were you able to determine what the result was of this particular color test?

A. In this particular color test it did not turn any color.

Q. And based on your training and experience, what does that indicate?

STATE v. BREWINGTON

[204 N.C. App. 68 (2010)]

A. That indicates that such drugs like heroin, which would turn purple for this test; or methamphetamine, which would turn orange, are not present. We're looking for something that doesn't turn this particular color test a color.

....

Q. And when you reviewed this particular case, did you see the result of this [second] test?

A. I did.

Q. And what was the result of that test?

A. It turned blue.

Q. And based on your training and experience, what does that mean?

A. It means that those specific chemical groups are present.

Q. What was the next test that was performed?

A. The next test was a crystal test.

....

Q. And based on your review of the lab report, were you able to determine what the result was of this particular test?

A. Yes, crosses were obtained. Those specific crosses were obtained.

Q. And what does that result mean to you as a chemical analyst?

A. It indicates that cocaine is present.

....

Q. [T]he testing that Agent Gregory did on April 9 of 2008, was that reviewed by anyone else at the State Bureau of Investigation Laboratory?

A. It was reviewed by the supervisor of the Drug Chemistry Section, Ann Hamlin.

....

Q. Now have you reviewed the testing procedures that you've described and the results of the examinations of the test yourself?

STATE v. BREWINGTON

[204 N.C. App. 68 (2010)]

A. I have.

Q. And have you also reviewed Agent Gregory's conclusion?

A. I have.

Q. Have you formed an opinion as to the item that was submitted inside the plastic bag that's been marked as State's Exhibit 1B?

A. I have.

Q. And what is your opinion based on?

A. Based upon all the data that she [Agent Gregory] obtained from the analysis of that particular item, State's Exhibit 1B, I would have come to the same conclusion that she did.

Q. And what is your opinion as to the identity of the substance that was submitted as State's Exhibit 1B?

MR. GURLEY: Just objection for the record, Judge.

THE COURT: I'll overrule the objection. You can answer the question.

A. State's Exhibit 1B is the Schedule II controlled substance cocaine base. It had a weight of 0.1 gram.

The jury convicted defendant of possession of cocaine on 13 February 2009, and defendant gave oral notice of appeal.

II. JURISDICTION AND STANDARD OF REVIEW

Jurisdiction in this Court is proper pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). This Court reviews alleged violations of constitutional rights *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007). If a defendant shows that an error has occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2009). Under the *de novo* standard of review, this Court "considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)).

III. ANALYSIS

On appeal, defendant argues that it was reversible error for the trial court to allow the testimony of Special Agent Schell as to the

STATE v. BREWINGTON

[204 N.C. App. 68 (2010)]

identity of the substance contained in State's Exhibit 1B. Defendant argues that by permitting Special Agent Schell to testify as to her opinion regarding the substance based solely on testing conducted by Agent Gregory, defendant was denied his right under the Sixth Amendment to meaningfully confront the witness against him, Agent Gregory. We agree.

"The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004)). The U.S. Supreme Court has recently applied the holding in *Crawford* to documents or reports that the government seeks to enter into evidence that are "testimonial" in nature, holding that "[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence [is] error." *Melendez-Diaz v. Massachusetts*, 557 U.S. —, 174 L. Ed. 2d 314, 332 (2009).

In *Melendez-Diaz*, the government sought to introduce "certificates of analysis" as evidence that a substance was cocaine. The Supreme Court held that the "certificates of analysis" prepared by a forensic analyst for trial were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Id.* at —, 174 L. Ed. 2d at 321 (quoting *Davis v. Washington*, 547 U.S. 813, 830, 165 L. Ed. 2d 224, 242 (2006)).

In the case *sub judice*, we are faced not with the State's attempt to introduce the documents themselves as proof of the identity of a substance, but the testimony of an expert allegedly relying on such documents as the basis for her opinion. The North Carolina Supreme Court has squarely addressed the issue of expert testimony based on reports prepared by other, non-testifying experts in *State v. Locklear*, 363 N.C. 438, 681 S.E.2d 293 (2009). In that case, the North Carolina Supreme Court applied the holding of *Melendez-Diaz* to the in-court testimony of an expert who relied on the contents of "testimonial" reports prepared by forensic examiners. The *Locklear* Court held that

[t]he [*Melendez-Diaz*] Court determined that forensic analyses qualify as "testimonial" statements, and forensic analysts are "witnesses" to which the Confrontation Clause applies. The Court specifically referenced autopsy examinations as one such kind of forensic analyses. Thus, when the State seeks to intro-

STATE v. BREWINGTON

[204 N.C. App. 68 (2010)]

duce forensic analyses, “[a]bsent a showing that the analysts [are] unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them” such evidence is inadmissible under *Crawford*.

Id. at 452, 681 S.E.2d at 304-05 (quoting *Melendez-Diaz*, 557 U.S. at —, 174 L. Ed. 2d at 322).

The *Locklear* Court made clear that, like the certificates of analysis at issue in *Melendez-Diaz*, the contents of the reports were “testimonial,” and the defendant had the right to confront the expert that had prepared the report, and who in effect was “testifying” through that report. *Locklear*, 363 N.C. at 452, 681 S.E.2d at 304-05.

This Court has applied the *Locklear* extension of *Melendez-Diaz* in several decisions relevant to this appeal. In *State v. Galindo*, — N.C. App. —, 683 S.E.2d 785 (2009), this Court held that the trial court erred in admitting the testimony of chemist Michael Aldridge, where the record showed that Aldridge

had been the supervisor of the lab for 20 years. Aldridge testified that although he did not personally weigh or observe the weighing of the seized cocaine, as part of his supervisory duties he calibrated the scale on which it was weighed both the month before and after it was weighed and found that the scale was in “perfect working order.” When asked, Aldridge stated that the analyst that had identified and weighed the cocaine and prepared the lab report was currently working in a crime lab in South Carolina and that she had not been subpoenaed to testify.

Aldridge explained the chain of custody procedures at the lab and stated that they had been followed in this case. Aldridge stated that the lab’s analysis procedures exceeded industry standards and that the types of tests performed and recorded in the lab’s reports are relied upon by experts in the field of forensic chemistry. Aldridge then went on to testify that in his opinion—based “solely” on the lab report—the substances seized from the West Ridge Road residence were, in fact, marijuana and cocaine. With respect to the cocaine, Aldridge gave his opinion—over defendant’s objections—that approximately 1031.83 grams of cocaine [were] found in various parcels.

Galindo, — N.C. App. at —, 683 S.E.2d at 787. Though we held that admission of Aldridge’s testimony was error, we did not reverse defendant’s conviction because the State succeeded in meeting its

STATE v. BREWINGTON

[204 N.C. App. 68 (2010)]

burden on appeal that the error was harmless beyond a reasonable doubt based on other evidence adduced at trial. *Id.* at —, 683 S.E.2d at 788-89.

After *Galindo*, this Court held in *State v. Mobley*, — N.C. App. —, 684 S.E.2d 508 (2009), *disc. review denied*, 363 N.C. 809, — S.E.2d — (2010), that a forensic DNA analyst's expert opinion was admissible because the expert merely *based* her opinion on otherwise inadmissible testimonial hearsay documents. In reviewing the DNA expert's testimony under a plain error standard of review via Rule 2 of the North Carolina Rules of Appellate Procedure, this Court observed that the State's expert "testified not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data." *Mobley*, — N.C. App. at —, 684 S.E.2d at 511.

State v. Davis, — N.C. App. —, 688 S.E.2d 829 (2010) followed *Galindo* and *Mobley*. In that case, we upheld defendant's convictions for possession with intent to sell or deliver cocaine and sale of cocaine, in part, because defense counsel at trial failed to object to the forensic expert's testimony on Sixth Amendment grounds. *Id.* at —, 688 S.E.2d at 834 ("As Defendant failed to object at trial to any of the aforementioned testimony, Defendant failed to preserve for appeal the argument that the evidence was erroneously admitted."). Since the defendant in *Davis* failed to object to "copious" evidence at trial showing that the confiscated substance was crack cocaine—including the forensic chemist's expert testimony based purely on underlying tests not performed by the testifying expert—we held that admission of the underlying testimonial report was harmless beyond a reasonable doubt. *Id.* at —, 688 S.E.2d at 835 ("[W]e conclude that, even if Aldridge's laboratory report was erroneously admitted, such error was harmless beyond a reasonable doubt in view of the copious—indeed, overwhelming—unchallenged evidence establishing that the substance at issue was crack cocaine.").

This Court distinguished *Galindo* and applied the *Mobley* exception in a new factual context in *State v. Hough*, — N.C. App. —, 690 S.E.2d 285 (2010). In *Hough*, we held that the admission of expert forensic testimony on the issue of whether several confiscated substances were, in fact, marijuana and cocaine was not plain error under *Locklear*. *Id.* at —, 690 S.E.2d at 291. Despite the fact that the testifying expert in *Hough* did not conduct the tests on the contraband in issue, we concluded that the testifying expert conducted a

STATE v. BREWINGTON

[204 N.C. App. 68 (2010)]

“peer review” of her colleague’s work, such that *Galindo* did not preclude admission of the forensic expert’s testimony.

The report at issue in this case formed the basis of Alloway’s expert opinion, but was not offered for the proof of the matter asserted and was not *prima facie* evidence that the substances recovered from the crime scene were, in fact, marijuana and cocaine. It is not our position that every “peer review” will suffice to establish that the testifying expert is testifying to his or her expert opinion; however, in this case, we hold that Alloway’s testimony was sufficient to establish that her expert opinion was based on her own analysis of the lab reports.

Id.

In the most recent case in this series, *State v. Brennan*, this Court held that an expert’s “peer review” of drug testing procedures by a testing analyst was not admissible evidence. No. COA09-1362, 2010 WL 1753339, *3-4 (N.C. Ct. App., May 4, 2010). In concluding that the forensic expert chemist’s “peer review” failed to qualify as an admissible independent opinion at trial, this Court stated:

It is obvious from the above-excerpted testimony that Agent Icard was merely reporting the results of other experts. We cannot conclude from this, as this Court did in *Mobley*, that “the underlying report, which would be testimonial on its own, is used as a basis for the opinion of an expert who independently reviewed and confirmed the results, and is therefore not offered for the proof of the matter asserted under North Carolina case law.” *Id.* at —, 684 S.E.2d at 512. On the contrary, as Agent Icard explained on cross-examination, her “review” consisted entirely of testifying in accordance with what the underlying report indicated. Although there is some indication that Agent Knott was unavailable due to illness, there is no indication in the record of any prior opportunity by Defendant to cross-examine Agent Knott.

Agent Icard did no independent research to confirm Agent Knott’s results; in fact, she saw the substance for the first time in open court when she testified to what—in her expert opinion—it was. Such expertise is manifestly no more reliable than lay opinion based on a visual inspection of suspected powder cocaine, such as has been deemed inadmissible. *See State v. Llamas-Hernandez*, 189 N.C. App. 640, 652, 659 S.E.2d 79, 86 (2008) (Steelman, J., dissenting), *rev’d for reasons stated in the dissent*,

STATE v. BREWINGTON

[204 N.C. App. 68 (2010)]

363 N.C. 8, 673 S.E.2d 658 (2009) (per curiam). Insofar as Agent Icard testified to Agent Knott's results, the testimony violated Defendant's constitutional rights as interpreted in *Melendez-Diaz* and *Locklear*.

Id. at *4.

In making our decision here, we believe it is paramount to revisit *Melendez-Diaz* to ensure clarity. We believe that *Melendez-Diaz* and *Locklear*, without further influence, clearly resolve the admissibility of (1) an expert utilizing data collected by another person to form an independent opinion and (2) the impermissible reiteration of another's findings and conclusions. The Supreme Court in *Melendez-Diaz* stated that the foundation for a Confrontation Clause analysis is as follows:

"[T]he [Confrontation] Clause's ultimate goal is to ensure *reliability* of evidence, but it is a *procedural* rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."

Melendez-Diaz, 557 U.S. at —, 174 L. Ed. 2d at 326 (emphasis added) (citation omitted). The Supreme Court went on to say that "[a] forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution." *Id.* The Court explained that "[c]onfrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant . . . the same cannot be said of the fraudulent analyst." *Id.* "Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony." *Id.* "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials." *Id.* at —, 174 L. Ed. 2d at 326-27. "Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." *Id.* at —, 174 L. Ed. 2d at 327.

STATE v. BREWINGTON

[204 N.C. App. 68 (2010)]

These excerpts make clear that the purpose of requiring the analysts themselves testify is so that their honesty, competence, and the care *with which they conducted the tests* in question could be exposed to “‘testing in the crucible of cross-examination.’” *Id.* at —, 174 L. Ed. 2d at 326 (citation omitted). Thus, to allow a testifying expert to reiterate the conclusions of a non-testifying expert would eviscerate the protection of the Confrontation Clause.

Here, the question of whether the Sixth Amendment rights of defendant were violated turns on whether Special Agent Schell offered an independent expert opinion as to the chemical composition of the State’s evidence or whether she merely summarized the findings of Agent Gregory. If Special Agent Schell simply offered the opinion contained in Agent Gregory’s report—the type of report that the Supreme Court held to be “testimonial” in *Melendez-Diaz* and that the North Carolina Supreme Court held to be inadmissible through a testifying expert in *Locklear*—then the defendant’s right to confrontation was implicated and violated. If, however, Special Agent Schell offered her own expert opinion based on independent analysis, then her use of the underlying report prepared by Agent Gregory as a source of data facilitating that analysis would not violate defendant’s right to confrontation.

Applying the rules articulated in *Melendez-Diaz* and *Locklear* to the case at bar, a four-part inquiry¹ is necessary: (1) determine whether the document at issue is testimonial; (2) if the document is testimonial, ascertain whether the declarant was unavailable at trial and defendant was given a prior opportunity to cross-examine the declarant; (3) if the defendant was not afforded the opportunity to cross-examine the unavailable declarant, decide whether the testifying expert was offering an independent opinion or merely summarizing another non-testifying expert’s report or analysis; and (4) if the testifying expert summarized another non-testifying expert’s report or analysis, determine whether the admission of the document through another testifying expert is reversible error.

In this case, the law is clear that the report utilized by Special Agent Schell was testimonial in nature. *Melendez-Diaz*, 557 U.S. at —, 174 L. Ed. 2d at 321 (testimonial evidence includes “‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be

1. For an explanation on the genesis of this inquiry, see *State v. Conley*, COA09-456, 2010 WL 157554 (Jan. 5, 2010) (unpublished) and *State v. King*, COA09-524, 2010 WL 521022 (Feb. 16, 2010) (unpublished).

STATE v. BREWINGTON

[204 N.C. App. 68 (2010)]

available for use at a later trial' ") (citation omitted). Moreover, there is nothing in the record to suggest that the State claimed that Agent Gregory was unavailable and defendant had a previous opportunity to cross-examine Agent Gregory. Accordingly, we conclude that Agent Gregory's report was inadmissible testimonial evidence, so we next examine whether Special Agent Schell's testimony based on Agent Gregory's report was an independent expert opinion or merely a summation of inadmissible testimonial evidence.

Special Agent Schell testified extensively at trial about the testing procedures that are typically adhered to at the SBI lab. She testified regarding the manner in which tests are conducted in the regular course of business. However, the following exchange that occurred between Special Agent Schell and defense counsel on cross-examination is revealing:

Q. Okay. And it's true that you did not perform any of the tests on this evidence; is that correct?

A. It is. I did not perform these tests.

Q. So you didn't do any color test that came back negative—or the first test in this case you said didn't show any color change; is that right?

A. That's correct.

Q. So it didn't test—it didn't test positive on the first test. The second test you didn't observe any part of this evidence put in a liquid and turn blue.

A. I did not, but these are tests that are commonly performed in our section.

Q. Right. But my point is you didn't do this test so you don't know; you didn't see it turn blue for yourself.

A. I did not, no.

Q. Okay. And the crystal test, you didn't look through the slide that was where a part of the evidence was mixed with a liquid and showed cross crystals. You didn't actually see that, did you?

A. I did not, no.

Q. And the last test about the graph that had to be cleaned up, you didn't see this actual result being cleaned up or see the test performed, did you?

STATE v. BREWINGTON

[204 N.C. App. 68 (2010)]

A. I did not see the test performed, but I have the data that Nancy Gregory obtained.

It is clear from the testimony of Special Agent Schell that she had no part in conducting any testing of the substance, nor did she conduct any independent analysis of *the substance*. She merely reviewed the reported findings of Agent Gregory, and testified that if Agent Gregory followed procedures, and if Agent Gregory did not make any mistakes, and if Agent Gregory did not deliberately falsify or alter the findings, then Special Agent Schell “would have come to the same conclusion that she did.” As the Supreme Court clearly established in *Melendez-Diaz*, it is precisely these “ifs” that need to be explored upon cross-examination to test the reliability of the evidence. *Melendez-Diaz*, 557 U.S. at —, 174 L. Ed. 2d at 327 (methodology that forensic drug analysts use “requires the exercise of judgment and presents a risk of error that might be explored on cross-examination”). Special Agent Schell could not have answered these questions because she conducted no independent analysis. She testified exclusively as to the tests that Agent Gregory claimed to have performed, and used testimonial documents not admissible under *Melendez-Diaz*. Her conclusion that she agreed with Agent Gregory’s analysis assumes that Agent Gregory conducted the tests in the same manner that Special Agent Schell would have; however, the record shows that Special Agent Schell had no such actual knowledge of Agent Gregory’s actions during the testing process.

The State’s attempt to posture Special Agent Schell’s testimony as an admissible “peer review” both at trial and on appeal is not persuasive. In the end, the transcript of the trial shows that the testimonial document prepared by Agent Gregory was admitted into evidence against defendant for the substantive purpose of showing that the contraband seized was cocaine. This end was achieved through the testimony of Special Agent Schell. Under *Melendez-Diaz* and *Locklear*, we are bound to conclude that this testimony was admitted in violation of defendant’s right under the Confrontation Clause of the Sixth Amendment.

In reaching this conclusion under these particular facts, we believe that the facts of this case are closer to those in *Brennan* rather than those in *Hough*. We believe that the *Hough* Court correctly stated that not “every ‘peer review’ will suffice to establish that the testifying expert is testifying to his or her expert opinion[.]” *Hough*, — N.C. App. at —, 690 S.E.2d at 291. Though the *Hough* Court did not further explain under what circumstances a “peer

STATE v. BREWINGTON

[204 N.C. App. 68 (2010)]

review” would skirt the edges of a constitutional violation and thus avoid the mandate of *Melendez-Diaz*, we believe that this case presents such a situation.

In *Melendez-Diaz*, Justice Scalia addressed a portion of the dissenting opinion—in which Justice Kennedy insisted that the “certificates of analysis” were admissible—because the certificates were akin to admissible authentications produced by a clerk of court at common law. In disagreeing with the dissent’s position, Justice Scalia explained the scope of the clerk’s ability to provide evidence through the authenticating document in the context of the Confrontation Clause:

The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk’s certificate authenticating an official record—or a copy thereof—for use as evidence. But a clerk’s authority in that regard was narrowly circumscribed. He was permied “to certify to the correctness of a copy of a record kept in his office,” but had “no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect.” The dissent suggests that the fact that this exception was “‘narrowly circumscribed’” makes no difference. To the contrary, it makes all the difference in the world. It shows that even the line of cases establishing the one narrow exception the dissent has been able to identify simultaneously vindicates the general rule applicable to the present case. A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.

Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk’s certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk’s statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk’s certificate would qualify as an official record under respondent’s definition—it was prepared by a public officer in the regular course of his official duties—and although the clerk was certainly not a “conventional witness” under the dissent’s approach, the clerk was nonetheless subject to confrontation.

STATE v. BREWINGTON

[204 N.C. App. 68 (2010)]

Melendez-Diaz, 557 U.S. at —, 174 L. Ed. 2d at 328-29 (footnotes and citations omitted).

This same distinction is applicable here. If the *substance* of a testimonial document is to be admitted into evidence, the author of the testimonial document must be subjected to confrontation either (1) before trial if he or she is unavailable and defendant chooses to exercise his right or (2) during trial if he or she is available. If a third party, such as an expert, wishes to give testimony concerning the contents of a testimonial document, he or she may take one of two permissible approaches: (1) “certify” the correctness of the testimonial document without offering either an “interpretation of what the record contains or shows” or a certification “to its substance or effect,” *id.* at —, 174 L. Ed. 2d at 328; or (2) render an opinion independent of the substance of the testimonial document such that the information in the document is not being offered for the truth of the matter asserted.

It is precisely these principles that support the divergent directions of *Mobley* and *Brennan*. As *Mobley* explains in detail, a forensic DNA analyst must perform an independent analysis of raw data to form their expert opinion. *Mobley*, — N.C. App. at —, 684 S.E.2d at 511-12. In this process, the underlying DNA data collectors do not reach their own conclusions that are then merely reviewed by the forensic expert based solely on a cold record. *Id.* This contrasts starkly with the process utilized in this case.

As Special Agent Schell testified, her expert opinion could go no further than the determination that she “would have come to the same conclusion” as the testing analyst. This, as *Brennan* correctly holds, is not an independent expert opinion arising from the observation and analysis of raw data. Unlike an analysis of DNA data, there is no opportunity for a meaningful cross-examination of testimony concerning the results of a drug test, and a defendant presented with such damning evidence can only hope to attack pure assumptions on whether procedures were properly followed during the forensic testing process. As the Supreme Court explained in *Melendez-Diaz*, it is this sort of accountability, placed directly on the testing analyst, that the Sixth Amendment requires. It was therefore error to allow Special Agent Schell to testify concerning the composition of the confiscated substance at issue in this case.

We now turn to the question of whether this error requires reversal. The only other evidence offered by the State at trial concern-

STATE v. BREWINGTON

[204 N.C. App. 68 (2010)]

ing the composition of the “offwhite rock like substance” was Officer Serlick’s testimony.

Q. And what happened next?

A. . . . I picked the napkin up, looked inside the napkin and saw an offwhite rock like substance, what I *believed* to be cocaine.

(Emphasis added.)

Unlike *Galindo* and *Davis*, this evidence is not sufficient to show that the admission of Special Agent Schell’s testimony was harmless beyond a reasonable doubt. *State v. Lewis*, 361 N.C. 541, 549, 648 S.E.2d 824, 830 (2007) (“ ‘A violation of the defendant’s rights under the Constitution of the United States is prejudicial unless . . . it was harmless beyond a reasonable doubt.’ ”) (quoting N.C.G.S. § 15A-1443(b) (2005)). Absent any concrete evidence or testimony that the substance in question was indeed cocaine, it is possible that the jury could have reached a different conclusion regarding the guilt of defendant on the charge of possession of cocaine. We therefore agree with defendant that he should be awarded a new trial.

IV. CONCLUSION

The trial court erred in admitting the testimony of Special Agent Schell over defendant’s constitutional objection. Because the State has not shown that the error was harmless beyond a reasonable doubt, defendant is deserving of a new trial.

New trial.

Judges STROUD and ERVIN concur.

WHISNANT v. CAROLINA FARM CREDIT, ACA

[204 N.C. App. 84 (2010)]

DAVID NEAL WHISNANT AND LOIS MILLER WHISNANT, PLAINTIFFS v. CAROLINA
FARM CREDIT, ACA, DEFENDANT

No. COA09-180

(Filed 18 May 2010)

Sureties—accommodation makers—summary judgment—genuine issue of material fact—fraud—negligence—unfair trade practices

The trial court erred in a case arising out of loan defaults by granting summary judgment in favor of defendant bank on all claims including fraud in the inducement, actual fraud, negligence, and unfair trade practices. The record raised a genuine issue of material fact as to whether plaintiffs were induced to enter into a contract to help their extended family receive financing for a greenhouse in which plaintiffs had no ownership interest or financial benefit, in ignorance of facts materially increasing the risk of which defendant had knowledge, and defendant had an opportunity before accepting plaintiffs' undertaking to inform plaintiffs of such facts. Further, there was a genuine issue of material fact as to whether plaintiffs were accommodation makers.

Appeal by plaintiffs from order entered 21 August 2008 by Judge Forrest D. Bridges in Superior Court, Cleveland County. Heard in the Court of Appeals 2 September 2009.

Katten Muchin Rosenman LLP, by William L. Sitton, Jr., for plaintiffs-appellants.

Bell, Davis & Pitt, P.A., by Michael D. Phillips, for defendant-appellee.

STROUD, Judge.

Plaintiffs appeal the trial court's order granting summary judgment on all of their claims. For the following reasons, we reverse the trial court order granting summary judgment on all claims and remand for further proceedings.

I. Background

Plaintiffs alleged that defendant loaned money to James and Elaine Wilson ("the Wilsons") for their greenhouse project. Plaintiffs

WHISNANT v. CAROLINA FARM CREDIT, ACA

[204 N.C. App. 84 (2010)]

had an extensive business relationship with defendant outside of the context of the greenhouse project. Plaintiffs allege that they relied on representations made by defendant and agreed to co-sign the Wilsons' loan documents because of the defendant's representations. At least one of the loans was secured by plaintiffs' farm, which includes their personal residence. The Wilsons were unable to repay their loans and defendant attempted to collect the balance from plaintiffs, including an action to foreclose their farm. On 17 July 2007, plaintiffs filed a verified complaint with causes of action for fraud in the inducement, actual fraud, and negligence. Plaintiffs also requested injunctive relief to prohibit the foreclosure of their property. The history of the loans is quite complex and was summarized by the trial court in its preliminary injunction order as follows:

1. Plaintiffs are husband and wife, residents of Cleveland County and are owners of a residence and farm property located on Jackson White Road, Lawndale, North Carolina (the "Farm Property") consisting of approximately fifty-one (51) acres.

2. Defendant Carolina Farm Credit, ACA ("CFC") is a lending institution and is a member institution of the Farm Credit System, with its principal place of business in Statesville, North Carolina.

3. By letter dated June 19, 2007, Defendant notified Plaintiffs that it intended to initiate foreclosure proceedings to sell the Farm Property to satisfy certain indebtedness as hereinafter described pursuant to a Deed of Trust recorded in Book 1419 at Page 289 in the Cleveland County Registry, dated June 29, 2004.

4. Since 1998, the Plaintiffs have borrowed money for their own use through a series of loans from the Defendant, for which loans Plaintiffs have provided as security certain deeds of trust against the Farm Property described above. These deeds of trust are dated April 3, 1998, recorded in Book 1219 at Page 609; November 22, 2002, recorded in Book 1351 at Page 2309, of the Cleveland County Registry, respectively. The present balance of such loans owed by the Plaintiffs to the Defendant as of the date of this hearing was \$115,375.68, together with interest accumulating thereon at the rate of \$23.7783 per day.

5. James and Elaine Wilson ("Wilsons" or "Debtors") were the owners and operators of the South Mountain Greenhouse (the "Nursery"). The Wilsons are the sister and brother-in-law of the Plaintiff, David Whisnant.

WHISNANT v. CAROLINA FARM CREDIT, ACA

[204 N.C. App. 84 (2010)]

6. Between December 7, 2001 and July 29, 2005, the Plaintiffs, together with the Wilsons, signed a series of promissory notes to obtain financing for the South Mountain Greenhouse. Some of the later notes in the series were executed for purposes of consolidating, modifying and refinancing earlier notes made by the makers. These loans were made for the operation of the South Mountain Greenhouse by the Wilsons.

7. The loans described in paragraph 6 above were secured by a Deed of Trust on the Farm Property dated June 29, 2004 and recorded in Book 1419 at Page 289 of the Cleveland County Registry. Defendant also asserts that, pursuant to a Future Advances clause in the 1998 and the 2002 Deeds of Trust, these loans also are secured by the first and second priority deeds of trust against the Farm Property, though the Plaintiffs dispute this contention.

8. The Plaintiffs and Defendant disagree as to the role of the Plaintiffs in the transactions described above: the Plaintiffs refer to themselves as “accommodation makers” while the Defendant refers to the Plaintiffs as “co-makers.” This court does not consider it necessary to determine the exact status of the Plaintiffs in these transactions at this stage of the proceedings, but does note that, according to the evidence presented to date, the Plaintiffs did not receive any of the proceeds of the loans made for the operation of the South Mountain Greenhouse.

9. The total indebtedness presently owed arising out of the series of notes described in paragraph 6 above, as of the date of this hearing, was \$122,628.66, together with interest thereon from August 20, 2007, at the rate of \$30.8556 per day. There presently exists a default under the terms of payment under the applicable promissory notes for the said indebtedness.

10. Defendant has been unable to collect any payments on the said indebtedness from the Wilsons due to the filing of a Chapter 13 Bankruptcy Petition on September 9, 2005 by the Wilsons. Defendant has obtained relief from the bankruptcy stay to proceed against collateral, consisting both of the Farm Property and a security interest in certain greenhouse equipment. The parties disagree on the present status of liens against the greenhouse property.

On 19 September 2007, defendant answered plaintiff’s complaint alleging various affirmative defenses and requesting plaintiffs’ action

WHISNANT v. CAROLINA FARM CREDIT, ACA

[204 N.C. App. 84 (2010)]

be dismissed. On 19 November 2007, the trial court issued a conditional preliminary injunction staying the foreclosure of the plaintiffs' farm. On 8 January 2008, plaintiffs filed a "motion for order to show cause[.]" (original in all caps), for defendant's alleged violation of the preliminary injunction order; on this same date the trial court issued a show cause order and a notice of hearing. On 14 January 2008, defendant filed a motion to dismiss the show cause order, which was subsequently granted because defendant filed a voluntary dismissal of the foreclosure action.

On 29 February 2008, plaintiffs filed a motion to amend their complaint which was later allowed. Plaintiffs' amended complaint added a claim for unfair and deceptive trade practices. On 13 May 2008, plaintiffs filed a motion to extend the preliminary injunction order to prohibit defendant "from noticing or filing any claim of foreclosure[.]" On or about 27 June 2008, defendant filed a motion for summary judgment. On 21 August 2008, the trial court denied plaintiff's motion to extend the preliminary injunction order and granted summary judgment in favor of defendant. On 15 September 2008, plaintiffs filed a notice of appeal.

II. Standard of Review

We are reviewing the trial court's order granting summary judgment in favor of defendant as to all of plaintiffs' claims.

[T]he standard of review is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Summary judgment is appropriate when viewed in the light most favorable to the non-movant, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

S.B. Simmons Landscaping v. Boggs, — N.C. App. —, —, 665 S.E.2d 147, 152 (2008) (citations and quotation marks omitted) (citing N.C. Gen. Stat. § 1A-1, Rule 56(c)).

III. Summary Judgment

Plaintiffs contend that the trial court erred in granting summary judgment in favor of defendant regarding plaintiffs' claims for negligence, fraud in the inducement, actual fraud, and unfair and deceptive trade practices. Plaintiffs also contend that by signing the notes, they were accommodation makers.

WHISNANT v. CAROLINA FARM CREDIT, ACA

[204 N.C. App. 84 (2010)]

A. Application of Suretyship Law

In order to determine “whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law[.]” we must first know what law to apply. *S.B. Simmons Landscaping* at —, 665 S.E.2d 147, 152. Plaintiffs’ brief cites to *Trust Co. v. Akelaitis*, 25 N.C. App. 522, 525, 214 S.E.2d 281, 284 (1975) and *Gant v. NCNB*, 94 N.C. App. 198, 200, 379 S.E.2d 865, 867, *review dismissed*, 388 S.E.2d 453 (N.C. 1989), which are both cases regarding suretyship law. However, defendant contends that suretyship law is not applicable.

Defendant attempts to distinguish this case from *Akelaitis* and *Gant* on several grounds. First, defendant argues that both *Akelaitis* and *Gant* involved “motions to dismiss, rather than motions for summary judgment. Thus, these opinions set forth limited rules for pleading claims under suretyship law without the benefit of a developed record of evidence.” However, the rule of law is the same whether we are dealing with a motion to dismiss or a motion for summary judgment; this is demonstrated by *Constr. Co. v. Crain and Denbo, Inc.*, a case which proceeded to a bench trial and where certainly there was “a developed record of evidence.” 256 N.C. 110, 114, 123 S.E.2d 590, 593 (1962). In *Crain and Denbo*, this Court articulated that

[i]f the creditor knows or has good grounds for believing that the surety is being deceived or misled, or that he was induced to enter into the contract in ignorance of facts materially increasing the risk, of which he has knowledge, and he has an opportunity before accepting his undertaking, to inform him of such facts, good and fair dealing demand that he should make such disclosure to him; and if he accepts the contract without doing so, the surety may afterwards avoid it. It was at one time asserted that all the information in obligee’s power must be given to enable the promisor to estimate the character of the risk he is invited to undertake. This view, however, finds no support today. A surety is in general a friend of the principal debtor, acting at his request, and not at that of the creditor; and, in ordinary cases, it may be assumed that the surety obtains from the principal all of the information which he requires. This is the rule applicable unless there is some fact, which the creditor knows the surety probably will not discover, of such vital importance to the risk that the creditor must have been aware that the non-disclosure would in effect amount to a contrary representation to the surety. The conceal-

WHISNANT v. CAROLINA FARM CREDIT, ACA

[204 N.C. App. 84 (2010)]

ment must in fact or in law be fraudulent. There is nothing in the mere nature of the contract of suretyship itself which requires the obligee to disclose to the proposed surety all the material facts affecting the risk. There must be a duty on the part of the obligee to make the disclosure.

Id. at 120-21, 123 S.E.2d at 598 (citations, quotation marks, and ellipses omitted). Thus, the fact that we are addressing a motion for summary judgment instead of a motion to dismiss does not change the applicable law. The question we must consider as to summary judgment is whether, “when viewed in the light most favorable to the [plaintiffs], the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is [a] genuine issue as to any material fact[,]” *S.B. Simmons Landscaping* at —, 665 S.E.2d at 152, specifically whether defendant knew or had

good grounds for believing that the . . . [plaintiffs were] being deceived or misled, or that [they were] induced to enter into the contract in ignorance of facts materially increasing the risks, of which [defendant ha[d] knowledge, and [defendant] ha[d] an opportunity, before accepting [plaintiffs’] undertaking, to inform [them] of such facts.

Gant at 199-200, 379 S.E.2d at 867.

Defendant next contends that *Akelaitis* and *Gant* are distinguishable because though plaintiffs claim to be accommodation makers “the present case does not involve guarantors or sureties who were third parties to the primary loan obligations. Rather, under the plain terms of the promissory notes, [p]laintiffs were co-borrowers with the Wilsons and co-makers of the notes.”

N.C. Gen. Stat. § 25-3-419 provides that

(a) If an instrument is issued for value given for the benefit of a party to the instrument, the “accommodated party”, and another party to the instrument, the “accommodation party”, signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party “for accommodation”.

(b) An accommodation party may sign the instrument as maker, drawer, acceptor, or indorser and, subject to subsec-

WHISNANT v. CAROLINA FARM CREDIT, ACA

[204 N.C. App. 84 (2010)]

tion (d) of this section, is obliged to pay the instrument in the capacity in which the accommodation party signs. The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation.

N.C. Gen. Stat. § 25-3-419(a)-(b) (2007). Also, “[w]hether a person is an accommodation party is a question of fact.” N.C. Gen. Stat. § 25-3-419, Official Comment 3.

The evidence when “viewed in the light most favorable to” plaintiffs, *see S.B. Simmons Landscaping* at —, 665 S.E.2d at 152, forecasts that plaintiffs signed the 29 July 2005 promissory note and therefore incurred liability. Furthermore, plaintiffs signed the note in order for their extended family to receive financing for a greenhouse in which plaintiffs had no ownership interest and from which plaintiff would receive no financial benefit; plaintiffs were also not recipients of the loan proceeds. Thus, the evidence forecasts that plaintiffs “sign[ed] the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument” and therefore plaintiffs would have signed “for accommodation.” N.C. Gen. Stat. § 25-3-419(a). Though defendant is correct in noting that “[a]n accommodation party may sign the instrument as maker, drawer, acceptor, or indorser[,]” it must be further noted that

“[a]ny party to a negotiable instrument may be a surety if he signs for the accommodation of another party.” Restatement of Security § 82 cmt. k (1941 & Supp. 1991-92); *see also First Citizens Bank & Trust Co. v. Larson*, 22 N.C. App. 371, 376, 206 S.E.2d 775, 779, *cert. denied*, 286 N.C. 214, 209 S.E.2d 315 (1974) (“an accommodation party is always a surety”). This would also include makers and co-makers who sign for accommodation purposes.

Branch Banking and Trust Co. v. Thompson, 107 N.C. App. 53, 57 n.1, 418 S.E.2d 694, 697 n.1 (citation omitted), *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992); *see also* N.C. Gen. Stat. § 25-3-419, Official Comment 1 (“An accommodation party is a person who signs an instrument to benefit the accommodated party either by signing at the time value is obtained by the accommodated party or later, and who is not a direct beneficiary of the value obtained. An accommodation party will usually be a co-maker or anomalous indorser.”). As

WHISNANT v. CAROLINA FARM CREDIT, ACA

[204 N.C. App. 84 (2010)]

the evidence “viewed in the light most favorable to” plaintiffs, *see S.B. Simmons Landscaping* at —, 665 S.E.2d at 152, forecasts they are accommodation parties and thus sureties, *see Thompson* at 57 n.1, 418 S.E.2d at 697 n.1, suretyship law would apply and defendant’s attempt to distinguish *Akelaitis* and *Gant* fails. As we have concluded that all of defendant’s arguments regarding *Akelaitis* and *Gant* fail, we now consider whether there were “genuine issue[s] of material fact” in light of suretyship law. *See S.B. Simmons Landscaping* at —, 665 S.E.2d at 152.

B. Genuine Issues of Material Fact

Plaintiffs argue that all of their claims were erroneously dismissed. Defendant claims summary judgment was properly granted because “[p]laintiffs did not come forward with any evidence that [defendant] concealed or misrepresented material information regarding the financial condition of the Wilsons and South Mountain Greenhouse and because, as a matter of law, [defendant] did not owe [p]laintiffs a duty to disclose or warrant such information.” Defendant contends that “the record is nevertheless void of any evidence showing that [defendant] concealed from [p]laintiffs any material information regarding the Wilsons and South Mountain Greenhouse.”

In regard to defendant’s contentions, we first note that plaintiffs need not allege defendants made an affirmative misrepresentation to them as “[w]here there is a duty to speak, fraud can be practiced by silence as well as by a positive misrepresentation.” *Akelaitis* at 525, 214 S.E.2d at 284 (citation omitted). Furthermore, defendant may also have owed a duty to disclose to plaintiff its knowledge regarding the Wilsons’ and the greenhouse’s financial state. *See Gant* at 200, 379 S.E.2d at 867; *Akelaitis* at 526, 214 S.E.2d at 284 (“If the creditor knows, or has good grounds for believing that the surety is being deceived or misled, or that he was induced to enter into the contract in ignorance of facts materially increasing the risks, of which he has knowledge, and he has an opportunity, before accepting his undertaking, to inform him of such facts, good and fair dealing demand that he should make such disclosure to him; and if he accepts the contract without doing so, the surety may afterwards avoid it.” (citations and quotation marks omitted)).

In *Gant*, the “[p]laintiff . . . alleged the defendant knew that she was unaware of the financial condition of the principal debtor and knew she was relying on defendant’s good faith and financial exper-

WHISNANT v. CAROLINA FARM CREDIT, ACA

[204 N.C. App. 84 (2010)]

tise in making the loans.” *Gant* at 200, 379 S.E.2d at 867 (quotation marks omitted). This Court noted that

[t]he crux of plaintiff’s complaint is that defendant failed to fulfill its obligation to inform her of the financial condition of the company whose loans she guaranteed. Although there is no fiduciary relationship between creditor and guarantor, *in some instances a creditor owes a duty to the guarantor to disclose information about the principal debtor.*

If the creditor knows, or has good grounds for believing that the surety or guarantor is being deceived or misled, or that he is induced to enter into the contract in ignorance of facts materially increasing the risks, of which he has knowledge, and he has an opportunity, before accepting his undertaking, to inform him of such facts, good and fair dealing demand that he should make such disclosure to him; and if he accepts the contract without doing so, the surety or guarantor may afterwards avoid it.

94 N.C. App. at 199-200, 379 S.E.2d at 867 (emphasis added) (citations and brackets omitted). Although this Court has noted that “[i]t is unclear whether a breach of this duty to disclose is more properly labeled a breach of the covenant of good faith and fair dealing or a claim for negligent nondisclosure[,]” *see First Union Nat. Bank v. Brown*, 166 N.C. App. 519, 532, 603 S.E.2d 808, 818 (2004), we have recognized that an accommodation party may have a claim on this basis. *See Gant* at 200, 379 S.E.2d at 867. Thus, we disagree with defendant’s contentions and now consider whether there were genuine issues of material fact.

Summary judgment should not have been granted because the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there [are] . . . genuine issue[s] of . . . material fact.” N.C. Gen. Stat. § 1A-1, Rule 56(c). Plaintiff alleged defendant made material misrepresentations and Fred Miller, “a commercial lender and real estate specialist in major financial institutions around the country[,]” filed an affidavit stating that “CFC may have misrepresented its position regarding the Wilsons’ collateral to the Whisnants.” Mr. Miller further averred that

[f]rom November 22, 2002 through June 2005, the only basis for entering into these loan agreements was the security interest that CFC had obtained in the Whisnants’ farm property. Sound loan

WHISNANT v. CAROLINA FARM CREDIT, ACA

[204 N.C. App. 84 (2010)]

practices required that CFC inform the Whisnants in December 2001 and thereafter that there was no reasonable basis upon which to loan these monies to the Wilsons other than the equity provided by the Whisnants' real estate. If, as the Whisnants contend in their Verified Complaint, they repeatedly questioned CFC regarding the ability of the Wilsons to repay such monies as were actually disbursed by CFC to their account(s), sound loan practices would require that CFC disclose to the Whisnants, in writing, that there was no reason or evidence to believe that the Wilsons could possibly repay the principal amount of these loans.

In addition, David Whisnant testified during his deposition that he had worked with Carolina Farm Credit, and specifically Kathy Carroll, since 1984. Ms. Carroll had previously handled loans and deeds of trust for Mr. Whisnant, and he trusted her. Mr. Whisnant testified that it was Ms. Carroll who informed him a co-signer would be needed and that he and his wife "were depending on [Ms. Carroll] to tell [them] what [they] needed to know, as far as accommodation makers on South Mountain Greenhouse." As plaintiffs were signing more notes, they began to "question the financial health of the South Mountain Greenhouse" and were informed by Ms. Carroll that "everything looks to be running okay[.]" so they continued signing loan documents.

We conclude that the record before us raises a "genuine issue of material fact[.]" *see S.B. Simmons Landscaping* at —, 665 S.E.2d at 152, as to whether plaintiffs were "induced to enter into the contract in ignorance of facts materially increasing the risk, of which [defendant] ha[d] knowledge, and [defendant] ha[d] an opportunity before accepting [plaintiffs'] undertaking, to inform [plaintiffs] of such facts[.]" *Crain and Denbo* at 120, 123 S.E.2d at 598. We recognize that defendant contends it neither misrepresented nor concealed material information; however, for purposes of summary judgment we must view the evidence forecast in the light most favorable to plaintiffs, and thus a genuine issue of material fact does exist. *See S.B. Simmons Landscaping* at —, 665 S.E.2d at 152.

1. Negligence

Negligence is the breach of a legal duty owed by defendant that proximately causes injury to plaintiff. In order to establish actionable negligence, a plaintiff must show that: (1) defendant failed to exercise due care in the performance of some legal duty

WHISNANT v. CAROLINA FARM CREDIT, ACA

[204 N.C. App. 84 (2010)]

owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury. A duty is defined as an obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.

Guthrie v. Conroy, 152 N.C. App. 15, 25, 567 S.E.2d 403, 410-11 (2002) (citations, quotation marks, and brackets omitted).

In *Gant*,

[p]laintiff ha[d] alleged the defendant knew that she was unaware of the financial condition of the principal debtor and knew that she was relying on defendant's good faith and financial expertise in making the loans. Further, plaintiff alleged the defendant at all times knew or had sufficient information to know the principal debtor was insolvent. Plaintiff has alleged sufficient facts to state a claim against defendant, whether the cause of action is ultimately determined to be one for negligence or breach of duty of good faith, as plaintiff has labeled her claims.

Gant at 200, 379 S.E.2d at 867 (quotation marks omitted).

Here, the evidence "viewed in the light most favorable to" plaintiffs raises a "genuine issue of material fact[.]" *S.B. Simmons Landscaping* at —, 665 S.E.2d at 152, as to whether defendants negligently breached a duty of disclosure to plaintiffs, *see Gant* at 200, 379 S.E.2d at 867, which resulted in plaintiffs being "induced to enter into the contract in ignorance of facts materially increasing the risk, of which [defendant] ha[d] knowledge, and [defendant] ha[d] an opportunity before accepting [plaintiffs'] undertaking, to inform [plaintiffs] of such facts[.]" *Crain and Denbo* at 120, 123 S.E.2d at 598; *see Guthrie* at 25, 567 S.E.2d at 410-11. Accordingly, the trial court improperly granted summary judgment as to plaintiff's claim for negligence.

2. Actual Fraud

The essential elements of fraud are: (1) False representation or concealment of a past or existing material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party, *A claim for fraud may be based on an affirmative misrepresentation of a material fact, or a failure to disclose a material fact relating to a transaction which the parties had a duty to disclose.*

WHISNANT v. CAROLINA FARM CREDIT, ACA

[204 N.C. App. 84 (2010)]

Hardin v. KCS Intern., Inc., — N.C. App. —, —, 682 S.E.2d 726, 733 (2009) (emphasis added) (citations, quotation marks, and brackets omitted). Plaintiff's evidence shows that defendants may have misrepresented or concealed information regarding the financial state of the greenhouse project, in order to induce plaintiffs to co-sign the loan documents. Plaintiffs did co-sign the notes and are at risk of losing their farm and home because of the Wilsons' default. As plaintiffs have demonstrated genuine issues of material fact regarding fraud, the trial court erred in granting summary judgment on plaintiffs' claim for actual fraud. *See id.*; *see also Gant* at 200, 379 S.E.2d at 867.

3. Fraud in the Inducement

"The essential elements of fraud in the inducement are: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Media Network v. Long Haymes Carr, Inc.*, — N.C. App. —, 678 S.E.2d 671, 684 (2009) (citation, quotation marks, and brackets omitted). In this instance, as the elements for fraud in the inducement and the forecast of evidence are the same as for actual fraud, we again conclude that the trial court improperly granted summary judgment.

4. Unfair and Deceptive Trade Practices

"Proof of fraud in the inducement necessarily constitutes a violation of Chapter 75 and shifts the burden of proof from the plaintiff to the defendant, which must then prove that it is exempt from Chapter 75's provisions." *Media Network* at —, 678 S.E.2d at 684. As we have concluded that the trial court erred in granting summary judgment as to plaintiff's claim for fraud in the inducement, we also conclude that the trial court erred in granting it as to plaintiff's claim for unfair and deceptive trade practices as "[p]roof of fraud in the inducement necessarily constitutes a violation of Chapter 75[.]" *Id.*

C. Accommodation Party

Lastly, plaintiffs ask that we conclude they are accommodation makers; however, it is not the duty of this Court to find facts. *See In re J.Z.M.*, 191 N.C. App. 158, 162, 663 S.E.2d 435, 437 (2008) ("The trial court is the trier of fact[.]" (citation omitted)). As we noted above, there is a genuine issue of material fact as to whether plaintiffs are accommodation makers. The evidence as forecast by plaintiffs, if taken as true, demonstrates that they are accommodation makers;

LEE v. WINGET RD., LLC

[204 N.C. App. 96 (2010)]

however, we cannot make the factual determination necessary for us to conclude that plaintiffs are accommodation makers as a matter of law. *See id.*

IV. Conclusion

As we conclude that there was a genuine issue of material fact as to each of plaintiffs' claims, we reverse the order granting summary judgment and remand for further proceedings.

REVERSED AND REMANDED.

Judges GEER and ERVIN concur.

RODNEY A. LEE, AND WIFE, STEPHANIE F. LEE, LEO GIBSON, KAMAMU ABUBAKARI AND WIFE, JENIFER P. ABUBAKARI, HARLEE DAVIS AND WIFE, ALMA P. DAVIS AND MARY B. GRIFFIN, PLAINTIFFS v. WINGET ROAD, LLC, NVR, INC., T/A RYAN HOMES, NVR SETTLEMENT SERVICES, INC., BRIAN IAGNEMMA, TODD DAVID WILLIAMS, KUESTER ESTATE SERVICES, INC., AND ERIN BOTTENBERG, DEFENDANTS

No. COA09-828

(Filed 18 May 2010)

Appeal and Error— notice of appeal—failure to serve on all parties—jurisdictional—significant violation

An appeal was dismissed where plaintiff-appellants failed to comply with N.C. R. App. P. Rule 3(a) by not serving a notice of appeal on the non-appealing plaintiffs and previously dismissed defendants. Compliance with Rule 3 is jurisdictional and may be raised by the court. Furthermore, noncompliance is a significant and fundamental violation that frustrates the adversarial process and that no sanction less than dismissal will remedy.

Appeal by plaintiffs Rodney A. Lee and wife, Stephanie F. Lee, Harlee Davis and wife, Alma P. Davis, and Mary B. Griffin from order entered 4 February 2009 by Judge Yvonne Mims Evans in Superior Court, Mecklenburg County. Heard in the Court of Appeals 19 November 2009.

Parker Poe Adams & Bernstein LLP, by Michael G. Adams and Morgan H. Rogers, for defendants-appellees.

LEE v. WINGET RD., LLC

[204 N.C. App. 96 (2010)]

STROUD, Judge.

Plaintiff-appellants filed a notice of appeal of a summary judgment order dismissing their claims.¹ After the parties briefed the issues, defendant-appellees filed a motion to dismiss the appeal for failure to comply with the requirements of North Carolina Rule of Appellate Procedure 3(a) as to service of the notice of appeal. We agree with defendant-appellees and dismiss the appeal.

I. Background

On 7 March 2008, Rodney and Stephanie Lee (“Lees”), Leo Gibson (“Mr. Gibson”), Kamamu and Jenifer Abubakari (“Abubakaris”), Harlee and Alma Davis (“Davises”), and Mary Griffin (“Ms. Griffin”) filed a complaint against Winget Road, LLC (“Winget”), NVR, Inc. T/A Ryan Homes (“NVR One”), NVR Settlement Services, Inc. (“NVR Two”), Brian Iagnemma (“Mr. Iagnemma”), Todd Williams (“Mr. Williams”), Kuester Real Estate Services, Inc. (“Kuester”), and Erin Bottenberg (“Ms. Bottenberg”) regarding modifications to the Declaration for Winget Pond Subdivision. On 13 November 2008, all plaintiffs voluntarily dismissed defendants Kuester and Ms. Bottenberg from the action with prejudice. All remaining defendants, Winget, NVR One, NVR Two, Mr. Iagnemma, and Mr. Williams, filed motions for summary judgment.

On 4 February 2009, the trial court granted defendants’ motions for summary judgment. On 5 March 2009, Roger Bruny, as counsel for plaintiff-appellants the Lees, the Davises, and Ms. Gibson, filed a notice of appeal. On or about 11 June 2009, plaintiff-appellants withdrew their appeal as to Winget. On or about 16 September 2009, defendant-appellees NVR One, NVR Two, Mr. Iagnemma, and Mr. Williams, filed a motion to dismiss plaintiff-appellants’ appeal. The motion to dismiss was based on two grounds; the first ground is that “Appellants failed to serve the Notice of Appeal on all parties because Appellants failed to serve the Notice of Appeal on the non-appealing Plaintiffs and the Kuester Defendants.”

II. Motion to Dismiss

Defendant-appellees argue that plaintiff-appellants appeal should be dismissed because plaintiff-appellants failed to serve a notice of appeal on non-appealing plaintiffs, the Abubakaris and Mr. Gibson,

1. Though plaintiff-appellants’ counsel Roger H. Bruny did submit a brief to this Court, he failed to sign either the brief or the certificate of service. Pursuant to N.C.R. App. P. R. 28(b)(8), his name is therefore not listed as counsel for plaintiffs.

LEE v. WINGET RD., LLC

[204 N.C. App. 96 (2010)]

and on previously dismissed defendants, Kuester and Ms. Bottenberg, in violation of North Carolina Rule of Appellate Procedure 3(a). We first consider plaintiff-appellants' failure to serve the non-appealing plaintiffs.

A. Failure to Serve Notice of Appeal on Other Plaintiffs

The notice of appeal in the record provides that only the Lees, the Davises, and Ms. Griffin are appealing. The certificate of service for the notice of appeal certifies that it was served on Richard Fennell, Winget's attorney, and Michael Adams and Morgan Rogers, attorneys for NVR One, NVR Two, Mr. Iagnemma, and Mr. Williams. Neither the notice of appeal nor certificate of service mentions the Abubakarīs or Mr. Gibson. The record shows that Kenneth Davies of Davies & Grist, LLP represented the non-appealing parties, the Abubakarīs and Mr. Gibson, before the trial court. The notice of appeal and certificate of service also make no mention of Mr. Davies or his law firm.

1. Standing and Waiver

Plaintiff-appellants contend that defendant-appellees do not have standing to bring their motion to dismiss and that because defendant-appellants had over six months notice of this appeal, during which time substantial time and money have been spent, the issues in the motion to dismiss have been waived. However,

[i]n order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure. The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal.

Stephenson v. Bartlett, 177 N.C. App. 239, 241, 628 S.E.2d 442, 443 (citations and quotation marks omitted), *disc. review denied*, 360 N.C. 544, 635 S.E.2d 58 (2006). Furthermore, "an appellate court has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*." *Xiong v. Marks*, 193 N.C. App. 644, 652, 668 S.E.2d 594, 599 (2008). Thus, even assuming *arguendo* that defendant-appellees do not have standing or that they have waived any arguments for which they properly had standing, this Court still may and will consider whether plaintiff-appellants complied with Rule 3(a). *See id.*; *see also Guthrie v. Conroy*, 152 N.C. App. 15, 17, 567 S.E.2d 403, 406 (2002) ("[D]efendant's motion for dismissal presents a question of jurisdiction, which may be addressed by this Court at any

LEE v. WINGET RD., LLC

[204 N.C. App. 96 (2010)]

time, *sua sponte*, regardless of whether defendants properly preserved it for appellate review.” (citation omitted)).

In addition, plaintiff-appellants’ argument as to standing is based on a lack of prejudice to defendant-appellees. However, clearly the parties most likely to be prejudiced by this appeal are the unserved parties who, as best we can tell from the record, are unaware of the appeal and therefore cannot possibly file a motion to dismiss. Likewise, the parties who would need to waive the lack of service of the notice of appeal were not served with a notice and thus have not had the opportunity to waive service. Thus, we must consider whether dismissal of the appeal is necessary as this is the only way that we can address this issue of compliance with the Rules of Appellate Procedure and protection of the rights of all of the parties.

2. North Carolina Rule of Appellate Procedure 3(a)

Plaintiff-appellants argue that Rule 3(a) does not provide “that the Notice of Appeal must be served on all parties to the action at the trial level, nor does it provide that the Notice of Appeal should be served on parties who have chosen not [to] appeal.” We disagree with these contentions. Rule 3(a) provides that

[a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon *all other parties* within the time prescribed by subdivision (c) of this rule.

N.C.R. App. P. 3(a) (emphasis added).

Neither defendant-appellees nor plaintiff-appellants direct this Court to any case law regarding an appellant’s failure to serve a notice of appeal on parties on the same side of a suit. However, the plain language of Rule 3(a) provides that “all other parties” must be served with a copy of the notice of appeal. N.C.R. App. P. 3(a). “‘All’ is defined as ‘the whole quantity of,’ ‘everyone,’ or ‘entirely.’” *Farrior v. State Farm Mut. Auto. Ins. Co.*, 164 N.C. App. 384, 388, 595 S.E.2d 790, 793 (citation omitted), *disc. review denied*, 358 N.C. 731, 601 S.E.2d 530 (2004). Furthermore, this Court has dismissed a plaintiff’s appeal “because there is no proof of service of the notice of appeal on the other parties to the appeal, as is required by our Rules of Appellate Procedure.” *Spivey and Self v. Highview Farms*, 110 N.C. App. 719, 729, 431 S.E.2d 535, 541, *disc. review denied*, 334 N.C. 623, 435 S.E.2d 342 (1993).

LEE v. WINGET RD., LLC

[204 N.C. App. 96 (2010)]

In *Hale v. Afro-American Arts Int'l*, 335 N.C. 231, 436 S.E.2d 588 (1993), the appellant filed a notice of appeal, but failed to include in the record a certificate of service of the notice of appeal upon the appellee. *Id.* at 232, 436 S.E.2d at 589. The Court of Appeals dismissed the appeal, finding that the lack of a certificate of service of the notice of appeal was a jurisdictional defect. *Id.* Judge Wynn dissented and concluded that failure to serve the notice of appeal could be waived “by not raising the issue by motion or otherwise and by participating without objection in the appeal.” *Id.* The Supreme Court adopted Judge Wynn’s dissent and reversed the majority opinion. *Id.* Thus, pursuant to *Hale*, filing of the notice of appeal is jurisdictional, but where a notice of appeal is filed, service of the notice of appeal upon all parties may be waived.² *Id.*

In *Ribble v. Ribble*, the appellant filed a notice of appeal but failed to include in the record a certificate of service upon the appellee, who did not appear or file a brief in the appeal. 180 N.C. App. 341, 343, 637 S.E.2d 239, 240 (2006). This Court discussed *Hale* and concluded that the appellant in *Ribble* did not fall within the *Hale* exception because the “[appellee] . . . has not filed a brief or any other document with this Court or otherwise participated in this appeal. This record does not indicate plaintiff had notice of this appeal and plaintiff has not waived defendant’s failure to include proof of service in the record before this Court.” *Ribble* at 343, 637 S.E.2d at 240; see *In re C.T.*, 182 N.C. App. 166, 168, 641 S.E.2d 414, 415 (dismissing appeal pursuant to *Ribble*), *aff’d per curiam*, 361 N.C. 581, 650 S.E.2d 593 (2007); see also *Blyth v. McCrary*, 184 N.C. App. 654, 660, 646 S.E.2d 813, 817 (2007) (noting that the fact that a party allegedly told the appellant that he did not wish to be served with court documents still does not excuse another party from failing to serve all required documents on all required parties), *disc. review denied*, 362 N.C. 175, 658 S.E.2d 482 (2008).

Here, the record does not reflect that the non-appealing plaintiffs were ever notified of this appeal, and they have not filed any briefs or participated in the appeal in any way. In response to the motion to dismiss the appeal the appellants could have obtained written waivers from the unserved plaintiffs to present to this Court, but they

2. We note that this Court must consider this appeal because it presented a jurisdictional question. Though we have concluded that the actual issue presented, specifically regarding service upon the non-appealing plaintiffs, was not jurisdictional, it was necessary for us to consider this appeal in order to determine if the issue was jurisdictional.

LEE v. WINGET RD., LLC

[204 N.C. App. 96 (2010)]

failed to do so. The plaintiff-appellants' failure to comply with Rule 3 has not been waived by the non-appealing plaintiffs.

3. North Carolina Rule of Appellate Procedure 26(e)

Plaintiffs argue that because North Carolina Rule of Appellate Procedure 3(e) refers to Rule 26, Rule 26 controls. Rule 3(e) provides that "[s]ervice of copies of the notice of appeal may be made as provided in Rule 26 of these rules." N.C.R. App. P. 3(e). Plaintiffs then argue that North Carolina Rule of Appellate Procedure 26(e) states that "[a]ny paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them." N.C.R. App. P. 26(e) (emphasis added). However, the provision of Rule 26(e), entitled "Joint appellants and appellees," allows service on one party only as to parties who are *joined* in the appeal. *See id.* There is no indication in the record that plaintiffs-appellants and the Abubakaris and Mr. Gibson are "joint appellants." *See* N.C.R. App. P. 5(a).

North Carolina Rule of Appellate Procedure 5 sets forth the requirements for joinder of appellants in an appeal. *See id.* In order for appellants to be considered *joined* they

may give a joint oral notice of appeal or file and serve a joint notice of appeal in accordance with Rule 3 and 4; or they may join in appeal after timely taking of separate appeals by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties.

Id. Rule 5(c) goes on to provide that "[a]fter joinder, the parties proceed as a single appellant or appellee. Filing and service of papers by and upon joint appellants or appellees is provided by Rule 26(e)." N.C.R. App. P. 5(c) (emphasis added).

Rule 3(a) directs that *all* parties must be served with the notice of appeal. *See* N.C.R. App. P. 3(a). Rule 26 is entitled, "Filing and service." N.C.R. App. P. 26. Rule 26 describes methods of serving various appellate documents. *See id.* Furthermore, Rule 26(e) specifically addresses "[j]oint appellants and appellees[.]" N.C.R. App. P. 26(e). However, plaintiff-appellants' argument ignores Rule 5, which sets forth the procedure for joinder. *See* N.C.R. App. P. 5. The purpose of a notice of appeal is obviously to provide parties with notice that an appeal is being made. If the parties wish to join in the appeal under Rule 5, they may do so. *See* N.C.R. App. P. 5. However, unless there is joinder, *all* parties have to be served with the notice of appeal. *See*

LEE v. WINGET RD., LLC

[204 N.C. App. 96 (2010)]

N.C.R. App. P. (3)(a), 5, 26(e). The Abubakar and Mr. Gibson were not “joined in the appeal” with plaintiff-appellants and thus Rule 26(e) is inapplicable. N.C.R. App. P. 26(e), *see* N.C.R. App. P. 5(a), (c).

4. Dismissal

As plaintiff-appellants have failed to comply with Rule 3, we must now consider whether the appeal must be dismissed pursuant to *Dogwood Dev. & Mgmt. Co. LLC, v. White Oak Transp. Co.*, 362 N.C. 191, 193, 657 S.E.2d 361, 362 (2008). If the failure to comply with Rule 3 created “[a] jurisdictional default” we would be required “to dismiss the appeal.” *Id.* at 197, 657 S.E.2d at 365 (citations omitted). In fact, *Dogwood* noted lack of notice of appeal in the record or failure to give timely notice of appeal as examples of jurisdictional defects. *Id.* at 197-98, 657 S.E.2d at 365. However, *Dogwood* did not address the situation we have here, where a notice of appeal is properly and timely filed, but not served upon *all* parties. Pursuant to *Hale*, as noted above, we find that this violation of Rule 3 is a nonjurisdictional defect. *Hale*, 335 N.C. 231, 436 S.E.2d 588.

Dogwood states that a nonjurisdictional failure to comply with appellate rules “normally should not lead to dismissal of the appeal.” *Id.* at 198, 657 S.E.2d at 365 (citations omitted). Neither dismissal nor other sanctions under North Carolina Rules of Appellate Procedure 25 or 34 should be considered unless the noncompliance is a “substantial failure” to comply with the Rules or a “gross violation” of the Rules. *Id.* at 199, 657 S.E.2d at 366 (quotation marks omitted). This Court is required to make a “fact-specific inquiry into the particular circumstances of each case” mindful of the need to enforce the rules as uniformly as possible. *Id.* at 199-200, 657 S.E.2d at 366 (citations omitted). Dismissal is appropriate only for the “most egregious instances of nonjurisdictional default[.]” *Id.* at 200, 657 S.E.2d at 366 (citations omitted). To determine the severity of the rule violation, this Court is to consider: “[(1)] whether and to what extent the non-compliance impairs the court’s task of review[.] [(2)] . . . whether and to what extent review on the merits would frustrate the adversarial process . . . [, and (3)] [t]he court may also consider the number of rules violated[.]” *Id.* at 200, 657 S.E.2d at 366-67 (citations omitted).

In this instance, we find that the noncompliance has impaired this Court’s task of review and that review on the merits would frustrate the adversarial process. Failure to serve notice of appeal on all parties is a significant and fundamental violation. A notice of appeal is intended to let all parties to a case know that an appeal has been filed

LEE v. WINGET RD., LLC

[204 N.C. App. 96 (2010)]

by at least one party. Because two of the parties to this case³ were never informed of the fact that there was an appeal which affects their interests, this Court has no way of knowing the positions these parties would have taken in this appeal. The fact that these parties have not objected to our consideration of the appeal is irrelevant, because as far as we can tell from the record, these parties are unaware of the appeal. Simply put, all parties to a case are entitled to notice that a party has appealed. The unserved plaintiffs have been denied the opportunity to be heard, as they received no notice of the appeal and there is no written waiver filed in the record or in response to the motion to dismiss.

Notice to all parties is not a mere formality but a fundamental requirement of Rule 3(a). The United States Supreme Court has long recognized the importance of notice. “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 873 (1950) (citations omitted). The North Carolina Supreme Court has also noted that “[t]he fundamental premise of procedural due process protection is notice and the opportunity to be heard.” *Peace v. Employment Sec. Comm’n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (citation omitted). Although we are not directly addressing a due process issue in this case, these basic principles of law inform our analysis of the importance of the requirement of Rule 3(a) of service of a notice of appeal upon all parties. See N.C.R. App. P. 3(a), see generally *Mullane* at 314, 94 L. Ed. at 873, *Peace* at 322, 507 S.E.2d at 278.

The principles of due process also support our finding that failure to serve the notice of appeal upon all parties is a “gross violation” of the rules “which frustrates the adversarial process[.]” *Dogwood* at 200, 657 S.E.2d at 366-67. Once notice is served upon all parties, any

3. We are not addressing plaintiff-appellants’ failure to serve the notice of appeal upon defendants Kuester and Ms. Bottenberg, as these defendants were voluntarily dismissed with prejudice by all plaintiffs prior to both the order granting summary judgment and the filing of the notice of appeal. These defendants were not “parties” at the time of the notice of appeal, although we recognize that previously dismissed parties before the trial court might be “parties” on appeal where a plaintiff is challenging their dismissal. However, this dismissal was a voluntary dismissal which was agreed upon by all plaintiffs, not a dismissal by the trial court, and the dismissal is not a subject of the appeal.

LEE v. WINGET RD., LLC

[204 N.C. App. 96 (2010)]

party may chose not to participate, but our rules require that all parties have notice and an opportunity to participate to protect their own interests. *See* N.C.R. App. P. 3(a), *see generally* *Mullane* at 314, 94 L. Ed. at 873; *Peace* at 322, 507 S.E.2d at 278. The noncompliance impairs this Court's task of review as well, *see Dogwood* at 200, 657 S.E.2d at 366, as parties have been omitted from the case and we cannot review any contentions or arguments those parties might have raised.

In addition, requiring service of the notice of appeal on all parties promotes uniformity in enforcement of the rules. *See Dogwood* at 199-200, 657 S.E.2d at 366. Rule 3 states plainly that "all . . . parties" must be served with the notice of appeal, N.C.R. App. P. 3(a), and as noted above, this is a fundamental requirement for the rest of the appeal. *Hale* has previously recognized that where the unserved parties have actual notice of the appeal and have participated in the appeal without objection, dismissal is not appropriate. *Hale*, 335 N.C. 231, 436 S.E.2d 588. In the situation presented in *Hale*, neither the adversarial process nor this Court's task of review was compromised; the violation in *Hale* was merely technical. *Compare id.*

No lesser sanction, such as monetary sanctions, can remedy this particular rule violation, as a sanction less than dismissal cannot make up for the failure to notify all parties of the existence of this appeal. We therefore conclude that dismissal is the only appropriate sanction under N.C.R. App. P. 34(b) and this sanction is also supported by *Hale*. *Hale*, 335 N.C. 231, 436 S.E.2d 588. Where we find that dismissal is the appropriate sanction, the Supreme Court in *Dogwood* has directed that we may consider invoking North Carolina Rule of Appellate Procedure 2, but we should do this only on "rare occasions and under exceptional circumstances . . . to prevent manifest injustice to a party, or to expedite decision in the public interest[.]" *Dogwood* at 201, 657 S.E.2d at 367 (citations, quotation marks, and brackets omitted). We do not find that this case presents exceptional circumstances where use of Rule 2 is required to prevent "manifest injustice" or that it is necessary to "expedite decision in the public interest." *Id.* Our decision to this effect is reinforced by the fact that we have reviewed plaintiff-appellant's substantive challenges to the trial court's summary judgment order and conclude that they have no merit.

B. Other Issues

As we are dismissing plaintiff-appellants' appeal we need not address defendant-appellees' other arguments in their motion to dismiss or plaintiffs' argument on appeal.

STATE v. McCORMICK

[204 N.C. App. 105 (2010)]

III. Conclusion

As plaintiff-appellants failed to comply with the plain language of a rule of appellate procedure, we dismiss.

DISMISSED.

Judges HUNTER, JR. and ERVIN concur.

STATE OF NORTH CAROLINA v. DONALD LEE McCORMICK

No. COA09-1032

(Filed 18 May 2010)

1. Indictment and Information— first-degree burglary—nominal error—indictment not fatally defective

The trial court did not err in denying defendant's motion to dismiss the charge of first-degree burglary because there was no fatal variance between the indictment and the proof adduced at trial. Although the indictment alleged that the breaking and entering occurred at 407 Ward's Branch Road and the evidence indicated that the house number was 317, this was a nominal or inconsequential error which did not render the indictment fatally defective.

2. Burglary and Unlawful Breaking or Entering— subject matter jurisdiction—indictment sufficient

The trial court did not lack jurisdiction over a first-degree burglary case where the indictment failed to allege that the breaking and entering was done "without consent" because this element is not required to be specifically pled.

3. Criminal Law— judicial notice—time of sunset—no error

The trial court in a first-degree burglary case did not impermissibly supply the essential element of an act being done at "nighttime" by taking judicial notice of the time of sunset. The application of judicial notice in this case was a routine application of this evidentiary rule.

STATE v. McCORMICK

[204 N.C. App. 105 (2010)]

Appeal by defendant from judgment entered 11 February 2009 by Judge Ronald E. Spivey in Watauga County Superior Court. Heard in the Court of Appeals 12 January 2010.

Attorney General Roy Cooper, by Assistant Attorney General, G. Mark Teague, for the State.

Megerian & Wells, by Franklin E. Wells, Jr., for defendant appellant.

HUNTER, JR., Robert N., Judge.

Donald Lee McCormick (“defendant”) appeals as a matter of right from a verdict finding him guilty of two counts of assault by pointing a gun, two counts of communicating threats, assault with a deadly weapon inflicting serious injury and first-degree burglary. On appeal, defendant argues that the trial court erred in the following manner: (1) by denying defendant’s motion to dismiss the first-degree burglary charge at the close of the evidence because of an alleged fatal variance between the indictment and the proof adduced at trial; (2) by hearing evidence regarding the first-degree burglary charge based on his contention that the trial court lacked jurisdiction because the indictment failed to allege, or there was insufficient proof, that the property was taken “without consent”; (3) by improperly taking judicial notice of the time of sunset, a necessary element of first-degree burglary; and (4) by submitting an improper verdict sheet and entering an improper judgment in the charges of pointing a gun at and communicating threats to Matthew Minton. After review, we hold that defendant’s trial and judgment was free of error.

I. FACTUAL BACKGROUND

The Watauga County grand jury indicted defendant for two counts of assault by pointing a gun, two counts of communicating threats, assault with a deadly weapon inflicting serious injury and first-degree burglary. The language, as pertinent to this appeal, contained in the 1 January 2008 indictment for first-degree burglary, in violation of N.C. Gen. Stat. § 14-51 (2009), provided the following:

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did during the nighttime [] break and enter the dwelling house of Lisa McCormick [sic] located at 407 Wards Branch Road, Sugar Grove, Watauga County. At the time of the breaking and entering

STATE v. McCORMICK

[204 N.C. App. 105 (2010)]

the dwelling house was actually occupied by Timothy James Ward, Amy Dancy, and Matthew Minton. The defendant broke and entered with the intent to commit a felony therein, to wit: Assault with a Deadly Weapon Inflicting Serious Injury.¹

At trial, the State's evidence tended to show the following: Defendant and Lisa McCormick ("Ms. McCormick") were married in 2001, had a daughter in 2003, and separated in 2006. After the couple separated, Ms. McCormick and the couple's daughter moved to a house located on Ward's Branch Road in Watauga County, North Carolina. The events which transpired and subsequently led to defendant's arrest and indictment occurred at the Ward's Branch Road residence.

On 1 January 2008, during the daylight afternoon hours, Ms. McCormick's brother Timothy James Ward ("Tim"), Tim's girlfriend Amy Dancy ("Amy"), and Matthew Minton ("Matthew") arrived at Ms. McCormick's house on Ward's Branch Road. They began drinking, playing poker, and listening to music while waiting for Ms. McCormick to arrive at the home. Approximately one hour after their arrival, Tim answered the telephone and recognized defendant's voice, who asked to speak to Ms. McCormick. Tim told defendant that Ms. McCormick was not at home, but was expected to arrive shortly; the phone call ended. Approximately five minutes later, defendant called a second time and began cursing at Tim when he answered defendant's call, whereupon Tim hung up the phone. Defendant called a third time and left a voice message when no one answered. Two other messages were subsequently left on the machine which Tim found threatening. Tim called his brother, Dennis Presnell ("Dennis"), and requested that he come to Ms. McCormick's house to help calm down defendant should he arrive. Dennis testified that he received three calls from Tim, the first at approximately 5:30 p.m., the second around 6:00 p.m., and the third call at approximately 6:15 p.m. On the third call, Dennis testified that he heard defendant's voice and recognized Tim's voice crying.

Approximately fifteen to twenty minutes after the last message from defendant to Tim, defendant arrived at Ms. McCormick's home, kicked in the backdoor, and fired three shots with his .22 caliber revolver. Matthew fled outside the home. Amy locked herself in a

1. State argues in its brief that the language of the indictment reads "during the nighttime between the hours of 6PM TO 7PM break and enter," however this language appears only in the warrant for arrest which was later replaced by the grand jury indictment quoted above.

STATE v. McCORMICK

[204 N.C. App. 105 (2010)]

bathroom. Tim initially ran to hide in the house, but after realizing his girlfriend Amy was locked in the bathroom, left his hiding place and approached the bathroom, at which point defendant hit Tim with the butt of the revolver, knocking him to the floor. Defendant continued to hit Tim about the face and head with the gun, stopping on several occasions to intermittently put the barrel of the weapon in Tim's mouth while threatening to shoot him.

Amy opened the bathroom door and saw defendant kicking and hitting Tim with the gun as he laid unconscious and bleeding. When Amy went to Tim's aid, defendant pulled her by her hair and threw her on the floor, while pointing the gun in her face and telling her, "Bitch, I will kill you."

Defendant dragged Tim into a nearby bedroom, whereupon Amy found a cell phone, called for emergency help, and fled to the back porch of the house. Tim regained consciousness and escaped out of the front door while defendant was momentarily distracted by the arrival of Tim's brother, Dennis, and Erin Street ("Erin"), Dennis's girlfriend. Tim collapsed into his brother's arms on the front porch as he was coming out of the front door. Dennis testified that he "believed it was like 8:30" and it was dark at the time he arrived at the home.

Defendant then emerged from the house, pulled out the revolver, pointed the barrel of the gun into Dennis's mouth, and asked Dennis if he wanted to die. Defendant threatened Erin also after she confronted defendant and slapped him. After this confrontation, Erin, Dennis, and Tim retreated to the driveway area. While they were retreating, a state trooper arrived and the trio took cover behind the highway patrol vehicle. Shortly thereafter, Deputy Edward Hodges and one other Watauga County Sheriff's Deputy arrived and arrested defendant. Lieutenant Green of the Watauga County Sheriff's Office testified that he was dispatched to the scene at approximately 7:07 p.m. and was the third officer to arrive at the scene.

Dr. Carol Olsen, the emergency medical physician who treated Tim, testified that his injuries included abrasions on his head, arms, and hip, damage to his teeth, a laceration to his right ear, a scalp laceration that was stapled, and a two-and-a-half-centimeter laceration through his lower lip that required stitches. Tim was confined to bed for two weeks and his injuries to his mouth and teeth required him to be fed by drinking from a straw.

STATE v. McCORMICK

[204 N.C. App. 105 (2010)]

At the close of the State's evidence, the State filed a motion with the court to take judicial notice of the time of sunset and civil twilight pursuant to Rule 201 of the North Carolina Rules of Evidence. The trial judge granted the State's motion and gave the jury the following instruction:

At the end of the State's case in chief Members of the Jury. The court will take judicial notice of two facts. In this case you may but are not required to accept as conclusive any fact judicially noticed by the Court.

The facts judicially noticed in this case are as follows. First that on January 1st, 2008 in Boone, North Carolina the sun set at 5:23 in the afternoon. And second, on January 1st[,] 2008 in Boone, North Carolina the end of civil twilight was 5:51 in the afternoon.

Civil twilight is defined to begin in the morning and to end in the evening when the center of the sun is geometrically six degrees below the horizon. This is the limit at which twilight illumination is sufficient under good weather conditions for terrestrial objects to be clearly distinguished. In [the] evening after the end of civil twilight artificial illumination is normally required to carry on outdoor activities.

Again, the Court will take judicial notice of these two facts, and you may but are not required to accept them as conclusive on these two issues.

Defendant's evidence tended to show the following: As his first witness, defendant recalled Deputy Edward Hodges. Deputy Hodges testified that the records of the Watauga County Sheriff's emergency system indicated that a 911 call was received from Melvie Ann Dollars at 7:06 p.m. This was the call to which Deputy Hodges responded when he arrived at Ward's Branch Road.

Defendant testified that he and Ms. McCormick lived together at the Ward's Branch Road residence after their separation during a brief, but failed attempt at reconciliation. Defendant moved out of the residence in April of 2007. Defendant further testified regarding his army service, employment history, and prior convictions for drunk driving and assault with a deadly weapon.

Regarding the 1 January 2008 incident, defendant testified that he called his wife's residence to speak with his daughter. Tim answered the phone and cursed at defendant. In two subsequent phone calls,

STATE v. McCORMICK

[204 N.C. App. 105 (2010)]

defendant testified that Tim told him that when his four-year-old daughter arrived at the house, he was going to have a “real good time with her.” This conversation angered defendant. Defendant grabbed his gun and about ten minutes later arrived at 317 Ward’s Branch Road, where he entered the house. Defendant testified that he did not intend to injure anyone when he entered the house, and that the gun accidentally fired when he came through the back door. Defendant describes the confrontations that took place in the house and admits to fighting with Tim and beating him.

On cross-examination, defendant admits that the answering machine showed the final call from defendant to the house to be at 6:36 p.m., and that it took defendant about 10 to 15 minutes to arrive thereafter. Defendant also admitted that it was getting dark when he arrived at the house. Furthermore, when the police arrived, defendant testified that he surrendered after being asked to do so.

At the close of all of the evidence, defendant renewed his motion to dismiss the charges, which was denied. After receiving instructions from the court, the jury found defendant guilty of two counts of assault by pointing a gun and communicating threats, assault with a deadly weapon inflicting serious injury, and first-degree burglary.

After the jury returned the verdict, the State presented evidence to the jury that defendant had attained the status of an habitual felon. The jury subsequently found defendant guilty of having attained such status. Defendant was sentenced within the presumptive range of 61 to 83 months’ imprisonment for the first-degree burglary conviction to run consecutively with a 23- to 37-month sentence of imprisonment for assault with a deadly weapon inflicting serious injury. In addition, defendant was sentenced to 75 days’ imprisonment to run concurrent with the other judgments for the two misdemeanor convictions of assault by pointing a gun and communicating threats. Defendant gave notice of appeal in open court.

II. FIRST-DEGREE BURGLARY CONVICTION

Defendant’s primary challenge in this appeal is to his conviction for first-degree burglary in violation of N.C. Gen. Stat. § 14-51. Specifically, defendant contends that (1) the trial court should have granted his motion to dismiss this charge on the basis that there was a fatal variance between the indictment and the proof, and (2) the trial court lacked jurisdiction because the indictment did not allege that the breaking and entering was done “without consent” and that

STATE v. McCORMICK

[204 N.C. App. 105 (2010)]

there was insufficient evidence of lack of consent. We disagree with both contentions.

First-degree burglary is defined as the unlawful breaking and entering of an occupied dwelling or sleeping apartment, at nighttime, with the intent to commit a felony therein. *State v. Hannah*, 149 N.C. App. 713, 719, 563 S.E.2d 1, 5 (2002). It is clear from comparing the elements of this common law crime, as described above from case law, and examining the indictment in this case that all of the legal elements of first-degree burglary were properly charged in the indictment.

**A. Fatal Variance Between the Indictment
and Proof at Trial**

[1] With regard to the first issue, defendant contends that the indictment was incomplete in charging the elements on the basis that it fails to properly identify the premises broken and entered into with sufficient certainty as to enable him to properly prepare a defense. In support, defendant cites that the indictment alleges that defendant “did break and enter the dwelling house of Lisa McCormick located at 407 Ward’s Branch Road, Sugar Grove Watauga County”; however, the evidence adduced at trial indicated that the house number was 317 instead of 407.

The contention that a defendant is not sufficiently informed of the place of the crime, if the indictment misidentifies the street number of the dwelling where a crime has taken place, has been the subject of adjudication in our appellate courts. *State v. Davis*, 282 N.C. 107, 113, 191 S.E.2d 664, 668 (1972), has established the law on this point.

In *Davis*, the indictment alleged that “the defendant ‘did unlawfully . . . break and enter the dwelling house of Nina Ruth Baker located at 840 Washington Drive, Fayetteville, North Carolina,’ ” but the evidence at trial tended to show that Ruth Baker lived at 830 Washington Drive. *Id.* Based on this indictment, where there was no controversy as to the location of Ms. Baker’s residence, the Court concluded that

[t]he description of the house in this case was adequate to bring the indictment within the language of the statute. This house was also identified with sufficient particularity as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. . . .

STATE v. McCORMICK

[204 N.C. App. 105 (2010)]

. . . We hold, however, that this inconsequential error in the street address appearing in the indictment does not render the indictment fatally defective.

Id.

We note that defendant's reliance on *State v. McDowell*, 1 N.C. App. 361, 161 S.E.2d 769 (1968), a Court of Appeals opinion which predated *Davis*, is misplaced. That opinion stands for the proposition that a fatal variance is present when the indictment alleges that the property entered was a "storehouse, shop, warehouse, banking house, counting house or other building" and the proof adduced at trial was in fact a "residence." *Id.* There is no identity issue present under these facts. As provided in *Davis*, a nominal or inconsequential error in the street address does not render the indictment fatally defective. *See Davis*, 282 N.C. at 113, 191 S.E.2d at 668. Moreover, defense counsel does not cite any case or posit any contention with regard to how, if at all, defendant was prejudiced by this error.

B. Jurisdiction of the Trial Court Where the Burglary Indictment Did Not Allege the Element of "Without Consent"

[2] With regard to the first-degree burglary charge, defendant's second contention is that the trial court did not have jurisdiction to hear the charge because the indictment failed to allege that the breaking and entering was done "without consent" of the owner of the house. We disagree.

Our case law does not require that this element be specifically pled for the crime of burglary. *See State v. Pennell*, 54 N.C. App. 252, 283 S.E.2d 397 (1981). The Court in *State v. Pennell* held that "language in the indictment, that the defendant 'unlawfully and wilfully did feloniously break and enter a building of Forsyth Technical Institute, belonging to the Board of Trustees' implies that defendant did not have consent of the Board of Trustees." *Id.* at 260, 283 S.E.2d at 402. In the case at bar, the identical language of the indictment carries the same implication or presumption as in *Pennell*. Defendant did not place this "consent" issue in controversy, but rather understood, according to his testimony, that he would not be welcomed at his estranged wife's house.

We hold that the indictment met the requirements of both statutory and common law and find no error in the criminal pleadings of this case.

STATE v. McCORMICK

[204 N.C. App. 105 (2010)]

III. JUDICIAL NOTICE

[3] Defendant argues that taking judicial notice of the time of sunset in a burglary case, which requires that the acts be done at “night-time,” has the effect of impermissibly supplying an essential element of the offense, lowers the State’s burden of proof, and amounts to an unfair weighing in by the Court. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 201, Judicial Notice of Adjudicative Facts, provides as follows:

(a) *Scope of rule.*—This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of facts.*—A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) *When discretionary.*—A court may take judicial notice, whether requested or not.

(d) *When mandatory.*—A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be heard.*—In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of taking notice.*—Judicial notice may be taken at any stage of the proceeding.

(g) *Instructing jury.*—In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

At the end of the State’s case-in-chief, and before defendant began presentation of his defense, the State filed a written motion with the court to take judicial notice of the time of the sunset and the time of civil sunset as established by the Naval Observatory. The court, out of the presence of the jury, gave defendant the opportunity

STATE v. McCORMICK

[204 N.C. App. 105 (2010)]

to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. Subsequently, the judge instructed the jury that it “may, but is not required to, accept as conclusive any fact judicially noticed.”

Our Courts have taken judicial notice of days, weeks, and months of the calendar. *See Weavil v. Myers*, 243 N.C. 386, 90 S.E.2d 733 (1956). Our Courts have also taken judicial notice of the time of sunrise and sunset on a particular date. *Oxendine v. Lowry*, 260 N.C. 709, 713, 133 S.E.2d 687, 687 (1963). Furthermore, our Courts have taken judicial notice of the phase of the moon and the time of its rising from the records of the U.S. Naval Observatory. *State v. Dancy*, 297 N.C. 40, 42, 252 S.E.2d 514, 515 (1979). The application of this rule of evidence in the present case is a routine application of this evidentiary principle, thus we hold that judicial notice was procedurally taken. The court committed no error in admitting the celestial timetable. *See also* Jason Emerson, Moonlight: Abraham Lincoln and the Almanac Trial, *Journal of the Illinois State Historical Society* (Summer 2001).

IV. CLERICAL ERROR

Both the State and defendant agree that there is a clerical error in the record with regard to the sentencing sheet. On the judgment, the court inadvertently listed the criminal action number for a case of a crime against Mr. Minton, which the District Attorney had dismissed. It is clear from the text of the document and the trial transcript that defendant was only convicted of the offenses against Ms. Dancy and Mr. Presnell. We therefore remand the matter to the trial court for the limited purpose of correcting the file number on the judgment sentencing for the purposes of “making the record speak the truth”.

V. CONCLUSION

Based on the foregoing, we hold that there was no error in the trial of defendant, but remand this matter to the trial court for correction of clerical errors in the judgment sentencing defendant.

No error.

Judges ELMORE and JACKSON concur.

GRANTHAM v. CRAWFORD

[204 N.C. App. 115 (2010)]

JUSTIN GRANTHAM, A MINOR CHILD, BY AND THROUGH THE TRUST COMPANY OF STERNE, AGEE & LEACH, INC., HIS GUARDIAN AD LITEM, PLAINTIFF V. ROBERT C. CRAWFORD, M.D., CAROLINA WOMANCARE, P.A., F/K/A ROBERT C. CRAWFORD, M.D., P.A., JOHN DOE; JOHN DOE, M.D.; HIGH POINT REGIONAL HEALTH SYSTEM, D/B/A HIGH POINT REGIONAL HOSPITAL; JOHN DOE P.C. AND JOHN DOE, INC., DEFENDANTS

No. COA09-528

(Filed 18 May 2010)

Medical Malpractice— Rule 9(j) certification—reasonable expectation of qualifications

The trial court erred by granting summary judgment on a medical malpractice claim in favor of defendants. Plaintiff reasonably expected that two witnesses would have been qualified under N.C.G.S. § 8C-1, Rule 702, thus satisfying the pleading requirements of N.C.G.S. § 1A-1, Rule 9(j).

Appeal by plaintiff from orders entered 31 October 2008 and 6 November 2008 by Judge John O. Craig, II in Guilford County Superior Court. Heard in the Court of Appeals 26 October 2009.

Ferguson, Stein, Chambers, Gresham & Sumter, P.A., by Adam Stein, William Simpson and James E. Ferguson, II, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Samuel G. Thompson, Robert E. Desmond and Elizabeth Horton, for Robert C. Crawford, M.D. and Carolina Womancare, P.A. f/k/a Robert C. Crawford, M.D., P.A., defendants-appellees.

Carruthers & Bailey, P.A., by Pamela A. Robertson, for High Point Regional Health System d/b/a High Point Regional Hospital, defendant-appellee.

JACKSON, Judge.

Justin Grantham (“plaintiff”), a minor child, by and through his guardian *ad litem*, appeals the 31 October 2008 and 6 November 2008 orders granting summary judgment of his medical malpractice claim to Robert C. Crawford, M.D. (“Dr. Crawford”); Carolina Womancare, P.A.; and High Point Regional Health System (“High Point Regional”) (collectively, “defendants”). For the reasons stated below, we reverse and remand.

GRANTHAM v. CRAWFORD

[204 N.C. App. 115 (2010)]

On 26 March 2008, plaintiff filed a complaint alleging medical negligence and breach of contract against defendants based upon the allegedly negligent delivery of plaintiff on 22 January 1997 and his subsequent neurological injuries. Although defendants include discussion of an earlier complaint in their briefs, plaintiff voluntarily dismissed that complaint and no information regarding it is included in the current record. Plaintiff offered two experts to satisfy the pleading requirement for a medical malpractice suit—Edith Gurewitsch, M.D. (“Dr. Gurewitsch”), and Certified Nurse-Midwife Pamela Scudder Kelly (“CNM Kelly”) (collectively, “proposed experts”).

Dr. Gurewitsch had spent several rotations during her residency in the early 1990’s at LaGuardia Hospital in Queens, New York, a small community hospital run by an HMO. When Dr. Gurewitsch worked there, LaGuardia had approximately four labor rooms, one obstetrical operation room, and an anesthesiologist whom doctors had to call in from home. In 1996, the year preceding the incident in question, Dr. Gurewitsch was a medical fellow in maternal and fetal medicine at New York Hospital, Cornell University Medical Center. She was a licensed physician at the time but was not yet board-certified. During 1996, Dr. Gurewitsch acted as an attending obstetrics-gynecological (“OB-GYN”) physician, working independently and supervising residents. Also during that time frame, maternal and fetal medicine attending physicians supervised Dr. Gurewitsch with respect to high risk procedures. Dr. Gurewitsch has never visited High Point, North Carolina, nor High Point Regional.

CNM Kelly was a registered nurse who was certified in midwifery in 1980. She practiced as a CNM in Raleigh, North Carolina, from 1980 through 1990; however, from 1985 through 1990, she did not perform deliveries. CNM Kelly did not maintain her licensure and certification in North Carolina after 1990. From 1990 through 2000, including the year in question, CNM Kelly practiced as a CNM at Bethesda Memorial Hospital in Boynton Beach, Florida. She often delivered babies during her decade at Bethesda Memorial. Bethesda Memorial was a Level 2 hospital at least part of the time during those ten years, had approximately six labor rooms, and had to call in a separate operation room team for Cæsarian sections. CNM Kelly has been to High Point and has relatives in the area but was unsure of whether she had visited High Point Regional. Both proposed experts opined that Dr. Crawford and the nursing staff at High Point Regional violated the applicable standards of care during plaintiff’s delivery on 22 January 1997.

GRANTHAM v. CRAWFORD

[204 N.C. App. 115 (2010)]

On 1 October 2008, defendants moved for summary judgment based upon North Carolina Rules of Evidence, Rule 702; North Carolina Rules of Civil Procedure, Rule 9(j); and North Carolina General Statutes, section 90-21.12. The trial court conducted a hearing on the motions on 27 October 2008. On 31 October 2008, the trial court granted summary judgment in favor of Dr. Crawford and Carolina Womancare, and on 6 November 2008, it granted summary judgment in favor of High Point Regional. Plaintiff appeals.

Plaintiff contends that he reasonably expected that Dr. Gurewitsch and CNM Kelly would qualify as experts pursuant to Rule 702, thereby satisfying the pleading requirements of Rule 9(j). The trial court, therefore, should not have granted defendants' motion for summary judgment. We agree.

"We review a trial court's ruling on summary judgment *de novo*." *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 247, 677 S.E.2d 465, 472 (2009) (citing *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008)). In addition, "[w]hether the pleader could reasonably expect the witness to qualify as an expert under Rule 702 presents a question of law and is therefore reviewable *de novo* by this Court." *Trapp v. Maccioli*, 129 N.C. App. 237, 241 n.2, 497 S.E.2d 708, 711 n.2 (1998) (citing *State v. Chaplin*, 122 N.C. App. 659, 664, 471 S.E.2d 653, 656 (1996)).

Rule 9(j) provides, in relevant part:

Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

(1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2007). Rule 702(b) sets forth the qualifications for an expert in a medical malpractice case:

In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:

GRANTHAM v. CRAWFORD

[204 N.C. App. 115 (2010)]

(1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:

- a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
- b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

(2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:

- a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
- b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

N.C. Gen. Stat. § 8C-1, Rule 702(b) (2007). Section 90-21.12 further clarifies that the standards an expert must apply are “the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.” N.C. Gen. Stat. § 90-21.12 (2007).

This Court inquires as to whether plaintiff reasonably expected Dr. Gurewitsch and CNM Kelly to qualify as expert witnesses pursuant to Rule 702, not whether they ultimately will qualify. *Smith v. Serro*, 185 N.C. App. 524, 527, 648 S.E.2d 566, 568 (2007) (citing N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2005); *Trapp*, 129 N.C. App. at 241, 497 S.E.2d at 711). “In other words, were the facts and circumstances

GRANTHAM v. CRAWFORD

[204 N.C. App. 115 (2010)]

known or those which should have been known to the pleader such as to cause a reasonable person to believe that the witness would qualify as an expert under Rule 702.” *Trapp*, 129 N.C. App. at 241, 497 S.E.2d at 711 (citing Black’s Law Dictionary 1265 (6th ed. 1990) (defining reasonable belief)).

According to our Supreme Court, “[a]ssuming expert testimony is properly qualified and placed before the trier of fact, section 90-21.12 reserves a role for the jury in determining whether an expert is sufficiently familiar with the prevailing standard of medical care in the community.” *Crocker v. Roethling*, 363 N.C. 140, 150, 675 S.E.2d 625, 633 (2009) (Martin, J., concurring) (citing N.C. Gen. Stat. § 90-21.12 (2007)). “Our statutes and case law do not require an expert to have actually practiced in the community in which the alleged malpractice occurred, or even to have practiced in a similar community.” *Id.* at 151, 675 S.E.2d at 633 (Martin, J., concurring) (citing N.C. Gen. Stat. § 90-21.12; N.C. Gen. Stat. § 8C-1, Rule 702(b) (2007)). “[O]ur law does not prescribe any particular method by which a medical doctor must become familiar with a given community. Book or Internet research may be a perfectly acceptable method of educating oneself regarding the standard of medical care applicable in a particular community.” *Id.* (Martin, J., concurring) (citing *Coffman v. Roberson*, 153 N.C. App. 618, 624-25, 571 S.E.2d 255, 259 (2002), *disc. rev. denied*, 356 N.C. 668, 577 S.E.2d 111 (2003)) (internal quotation marks omitted).

In the instant case, Dr. Gurewitsch was a licensed physician—she had received her license in 1992, five years before the incident in question; she worked in the same speciality as Dr. Crawford—both specialized in obstetrics; and in the year prior to the incident, she spent a majority of her time in either clinical practice or teaching—she spent all of her time as a medical fellow, practicing obstetrics and gynecology and teaching residents. Therefore, she satisfies the three basic elements of Rule 702(b). We agree with plaintiff that defendants’ arguments concerning Dr. Gurewitsch’s being supervised during the year in question and her lack of board certification at the time go to the weight of her testimony, rather than to her initial qualification.

CNM Kelly also satisfies Rule 702(b)—she had been certified as a nurse-midwife in North Carolina in 1980 and became dual-certified as a registered nurse and nurse-midwife in Florida in 1990; she and the nurses in the case *sub judice* all specialized in obstetrics; and in the year prior to the incident, she spent the majority of her time actively practicing obstetrical nursing at a hospital. The fact that she had not

GRANTHAM v. CRAWFORD

[204 N.C. App. 115 (2010)]

been involved in delivering babies in North Carolina for a decade—but rather had been a preceptor for medical students and then performed deliveries in Florida—again goes to the weight of the testimony, not the threshold qualification.

The major concern for both proposed experts is section 90-21.12, which requires that an expert witness apply the standard of practice from “the same or similar communities[.]” N.C. Gen. Stat. § 90-21.12. Our Supreme Court’s decision in *Crocker*, *supra*, provides helpful analysis as to whether the proposed experts’ depositions and affidavits reveal sufficient familiarity with High Point Regional as it relates to their experiences in community hospitals. We note that all parties in the instant case argue that *Crocker* is inapplicable, because unlike *Crocker*, the current case is not a “close case.” However, each party contends that these facts *clearly* are in his or its favor. We disagree.

As is true in the case *sub judice*, in *Crocker* a discrepancy appeared between the knowledge to which the expert testified in his deposition and the knowledge included in his subsequent affidavit. In *Crocker*, “Dr. Elliott’s [the proposed expert’s] deposition testimony tended not to support the admission of his testimony at trial.” 363 N.C. at 150, 675 S.E.2d at 633 (Martin, J., concurring). He was unsure about significant information, including the level of the hospital at issue, the number of beds it had, and facts about the community in which it was situated. *Id.* at 150-51, 675 S.E.2d at 633 (Martin, J., concurring).

Dr. Elliott’s affidavit, on the other hand, indicated that he had researched and was knowledgeable about the standard of care in Goldsboro[,]. . . [including] “the size of the population [of Goldsboro], the level of care available at the hospital, the facilities and the number of health care providers for obstetrics,” and “the prevailing standard of care for handling shoulder dystocia in the same or similar community to Goldsboro.”

Id. at 151, 675 S.E.2d at 633 (Martin, J., concurring) (quoting Dr. Elliott’s affidavit). Similarly, both Dr. Gurewitsch and CNM Kelly shared knowledge in their affidavits with respect to the community of High Point, its population, the per capita income there, the number of beds in High Point Regional, and the number of beds in the obstetrics unit, including one operating room for Cesarean sections. They both also stated that they had practiced in community hospitals “with similar equipment and facilities as High Point Regional Hospital and in an

GRANTHAM v. CRAWFORD

[204 N.C. App. 115 (2010)]

area of similar per capita income.” However, their deposition testimonies several months earlier generally had been lacking such specific information.

Even the depositions, though, contained some evidence of similarities between the hospitals in which the experts had practiced and High Point Regional. For instance, CNM Kelly stated that her hospital was a Level 2 for at least a portion of the time she worked there during the relevant time period; she also knew that, similar to High Point Regional, the staff at her hospital had to call in an operating room team for Cesarean sections. Of particular relevance is CNM Kelly’s reference to the policies and procedures of High Point Regional during her deposition. CNM Kelly specifically quoted the applicable policies of High Point Regional and explained that the nurses did not follow these policies and procedures during plaintiff’s delivery. Clearly, the policies of the specific hospital at issue are relevant evidence of that hospital’s local standard of care. Similarly, Dr. Gurewitsch stated her knowledge that High Point Regional was either a Level 1 or Level 2 hospital in 1997, that it had to call anesthesia from home, and that it had a separate operating room team for Cesarean sections. Although she had not reviewed any bylaws, policies, or procedures of High Point Regional, she did later review that information. Dr. Gurewitsch may have been more explicit than CNM Kelly that she applied a standard of care specific to High Point Regional and to Dr. Crawford when providing her expert opinions. The paper record, therefore, may be ambiguous—*i.e.* a close case—with respect to the extent of these experts’ bases of knowledge.

When this Court previously has interpreted *Crocker*, we reached a similar conclusion. The expert in *Barringer*, Dr. Mosca, spoke “in the language of N.C. Gen. Stat. § 90-21.12” in his affidavit, and yet, his deposition testimony created questions as to whether he had applied a national standard of care when evaluating the defendant’s actions. 197 N.C. App. at 247, 677 S.E.2d at 472-74. Dr. Mosca’s deposition testimony revealed that he was uncertain “whether Winston-Salem was indeed similar to the communities with which he was familiar.” *Id.* at 251, 677 S.E.2d at 474. Although neither Dr. Gurewitsch nor CNM Kelly seemed unsure of the standard she applied to the actions of Dr. Crawford and the nurses of High Point Regional, defendants nonetheless question whether the proposed experts’ knowledge with respect to the hospital is sufficient to make their testimonies relevant. Therefore, in accordance with both *Crocker* and *Barringer*, we reverse the trial court’s grant of summary

STATE v. REID

[204 N.C. App. 122 (2010)]

judgment and remand to the trial court to conduct a *voir dire* examination of the proposed experts.¹

For these reasons, we reverse the grant of summary judgment and remand to the trial court for further action consistent with this opinion.

Reversed and remanded.

Chief Judge MARTIN and Judge ERVIN concur.

STATE OF NORTH CAROLINA v. JIMMY REID

No. COA09-1292

(Filed 18 May 2010)

1. Appeal and Error— preservation of issues—constitutional issue not raised at trial

Defendant did not preserve for appellate review his argument that the trial court erred by failing to dismiss a charge of incest because the relevant statute was overbroad. Defendant did not raise this constitutional issue at trial.

2. Appeal and Error— preservation of issues—issue not raised at trial—failed to make offer of proof

Defendant did not preserve for appellate review his argument that the trial court erred in sustaining the prosecution's objections to defendant's cross-examination of the prosecuting witness. Defendant did not assert any constitutional claims at trial and failed to make any specific offer of proof when the trial court sustained the objections. Moreover, even if defendant had preserved this issue, he failed to show that the trial court abused its discretion.

1. According to Justice Newby in his dissent, "Justice Martin's opinion, having the narrower directive, is the controlling opinion . . . and requires the trial court to conduct a *voir dire* examination of the proffered expert witness." *Crocker*, 363 N.C. at 154 n.1, 675 S.E.2d at 635 n.1 (Newby, J., dissenting) (citing *Marks v. United States*, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 266 (1977) ("When a fragmented [Supreme Court of the United States] decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'")).

STATE v. REID

[204 N.C. App. 122 (2010)]

3. Constitutional Law— right to self-representation—no error—issue not preserved for appellate review

The trial court did not err by allowing defendant to represent himself because defendant's actions did not reflect mental illness, delusional thinking, or a defendant who lacked the mental capacity to conduct his trial defense unless represented. Furthermore, defendant did not preserve for appellate review his argument that he was denied his constitutional right to represent himself and present his defense because the trial court allowed jailers to seize defendant's legal papers at night when he returned to jail.

Appeal by defendant from judgment entered 30 January 2009 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 24 February 2010.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

M. Alexander Charns for defendant.

BRYANT, Judge.

Defendant Jimmy Reid was indicted on one count each of second-degree rape and incest. During the 20 January 2009 criminal session of Guilford County Superior Court, a jury found him guilty of both charges. The trial court sentenced defendant to 125 to 159 months on the second-degree rape charge and 19 to 23 months on the incest charge. The trial court also ordered defendant to register as a sex offender and be subject to satellite-based monitoring for the rest of his life. Defendant appeals. As discussed below, we find no error.

Facts

The evidence tended to show the following. C.H. had been defendant's step-daughter since defendant married her mother, L.R., in 1998. C.H. testified that she had a good relationship with defendant until she was sixteen, when he made a sexually suggestive comment to her. In 2007, C.H. got a rose tattoo near her waistline and defendant became angry about it, telling C.H. the tattoo was "drawing attention to [her] ass." Defendant again made sexual comments to C.H.

On 26 February 2008, L.R. was at work and C.H., then age nineteen, was in her bedroom. Defendant came into the room wearing only shorts and carrying a towel. Defendant told C.H. he was going to punish her for the tattoo drawing his attention to her. He straddled

STATE v. REID

[204 N.C. App. 122 (2010)]

C.H. on her bed, pulled her legs apart, and told her that they could “do it the hard way or the easy way.” C.H. struggled and pleaded with defendant to stop, but he had vaginal intercourse with her. Afterwards, defendant left C.H.’s room and she went to her boyfriend’s house to take a shower. A few hours later, C.H. told her mother what had happened, and C.H. was taken to the police department to make a report and to the hospital for an examination.

Following a lengthy pre-trial hearing, defendant was allowed to represent himself during the trial with court-appointed standby counsel. He did not present evidence but did cross-examine the State’s witnesses. During closing arguments, defendant admitted having sex with C.H. but claimed it was consensual.

Defendant made nine assignments of error which he brings forward in three arguments to this Court: that the trial court erred in (I) failing to dismiss the incest charge because the relevant statute is overbroad, (II) sustaining the prosecution’s objections to his cross-examination of C.H., and (III) allowing him to represent himself when he was mentally ill, or, in the alternative, allowing jailors to seize his legal papers when he returned to jail at night during the trial. After careful review of defendant’s arguments and the record, we find no error.

I

[1] Defendant first argues the trial court erred in failing to dismiss the incest charge against him, contending that N.C. Gen. Stat. § 14-178 is constitutionally overbroad. Because defendant did not preserve this issue for appellate review, we do not consider his argument and dismiss his related assignments of error.

“[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.” *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (citations omitted). Defendant was charged under N.C.G.S. § 14-178, which provides in pertinent part:

- (a) Offense.—A person commits the offense of incest if the person engages in carnal intercourse with the person’s (i) grandparent or grandchild, (ii) parent or child or stepchild or legally adopted child, (iii) brother or sister of the half or whole blood, or (iv) uncle, aunt, nephew, or niece.

N.C.G.S. § 14-178 (2009). In his brief, defendant argues that the statute is overbroad because it would criminalize sexual encounters

STATE v. REID

[204 N.C. App. 122 (2010)]

between consenting adults even after the familial bonds that linked them had been dissolved by death or divorce. However, our thorough review of the record indicates that defendant did not raise the constitutional issue of overbreadth at trial.

In a written pretrial motion, defendant moved to dismiss the incest charge, stating in pertinent part:

Now back to the Incest Indictment where Perjury was committed in order to obtain an Indictment by the Grand Jury. The lead Detective, Prosecutor and Magistrate All was [sic] complicity [sic] in Perjury when they implied that the plaintiff was a minor with evidence in hand shown [sic] plaintiff's age was 19 going on 20 years old and not a minor like 14-27.3(A) request [sic] Plaintiff or victim must be.

This motion raises no constitutional issue and instead appears to allege perjury before the grand jury and indicates defendant's confusion about the statute under which he was charged for the crime of incest. This motion mentions the "Incest Indictment," but then cites N.C. Gen. Stat. § 14-27.3, which concerns second-degree rape, a charge for which defendant was also indicted and convicted. Section 14-27.3 does not mention age of the victim. Defendant may have intended to refer N.C. Gen. Stat. § 14-27.7, entitled "Intercourse and sexual offenses with certain victims; consent no defense", which provides, in pertinent part:

(a) If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section.

N.C.G.S. § 14-27.7 (2009). However, defendant was not charged under this statute.

During the hearing on pretrial motions, defendant moved to allow his court-appointed counsel to withdraw and to be allowed to represent himself. When the trial court asked defendant why he wished to represent himself, he launched into a rambling explanation about his counsel colluding with the district attorney in refusing to meet with

STATE v. REID

[204 N.C. App. 122 (2010)]

defendant “because they knew that the evidence that I had to show would get both of my charges dismissed, both indictments dismissed.” Defendant then put forward the same argument from his written motion, as quoted above, that there was perjury before the grand jury about the age of C.H. Defendant was again apparently confused about the statute under which he was charged since he stated “the person must be a minor when you play a parental role then the person must be a minor” This language is similar to that quoted above from N.C.G.S. § 14-27.7 but does not appear in N.C.G.S. § 14-178. Again, defendant raised no constitutional issue but focused only on the “problem indictment.”

Later in the hearing, when the trial court asked defendant to sum up his concerns with his court-appointed counsel, defendant responded that the indictments “[d]oesn’t [sic] legally qualify according to the constitution.” Although defendant mentioned the constitution at this point, it was in connection with his concern about the possibility that someone committed perjury before the grand jury by claiming C.H. was a minor. At no point did he allege overbreadth of N.C.G.S. § 14-178 or even mention that statute.

Defendant also moved to dismiss at the close of all evidence based on insufficiency of the evidence and renewed the motion after the jury charge. Defendant did not mention overbreadth or make any other constitutional argument. The trial court denied those motions. Because defendant did not raise his constitutional arguments in the trial court, they are not properly before us, and we dismiss these assignments of error.

II

[2] Defendant next argues the trial court erred in sustaining the prosecution’s objections to his cross-examination of C.H. Because defendant failed to preserve this issue for our review, we dismiss his argument and related assignments of error.

“[A] witness may be cross-examined on any matter relevant to any issue in the case, including credibility.” N.C. Gen. Stat. 8C-1, Rule 611(b) (2009). However, “the trial court has the duty to ensure that time is not wasted in useless and repetitive presentation of the evidence.” *State v. Long*, 113 N.C. App. 765, 771, 440 S.E.2d 576, 579 (1994). The scope of cross-examination is left to the sound discretion of the trial court. *State v. Forte*, 360 N.C. 427, 442, 629 S.E.2d 137, 147, *cert. denied*, 549 U.S. 1021, 166 L. Ed. 2d 413 (2006). “[A]ny ‘ruling committed to a trial court’s discretion is to be accorded great defer-

STATE v. REID

[204 N.C. App. 122 (2010)]

ence and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.’ ” *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 832 (1985)). Finally, “[i]n order for this Court to rule on the trial court’s exclusion of evidence, a specific offer of proof is required unless the significance of the excluded evidence is clear from the record.” *Long*, 113 N.C. App. at 768, 440 S.E.2d at 578 (citing N.C. Gen. Stat. § 8C, Rule 103(a)(2) (1992) and *State v. Simpson*, 314 N.C. 359, 334 S.E.2d 53 (1985)).

Defendant bases this argument on his fifth and sixth assignments of error. Both assignments of error assert that defendant’s right to present a defense under the federal and state constitutions was violated. Assignment of error five refers to “objections to defendant’s questions to witnesses and to his closing argument.” Assignment of error six refers to “objections to defendant’s questions to his wife about her previous occupation and drug usage. [sic] argument.” In his brief, defendant explains that he wished to cross-examine C.H. about her relationship and feelings toward him and the “complicated family dynamics of a stepfamily” to show that C.H. had a motive to lie about being raped. In addition, he wished to cross-examine C.H. and L.R. about L.R.’s alleged drug use to show that L.R. did not “perceive events accurately.”

We first note that defendant did not assert any constitutional claims in the trial court and failed to make a specific offer of proof when the trial court sustained the State’s objections. Therefore, defendant has failed to preserve this issue for our review. *See Hunter*, 305 N.C. at 112, 286 S.E.2d at 539; *Long*, 113 N.C. App. at 768, 440 S.E.2d at 578. Further, even if defendant had preserved this issue, he fails to show any abuse of the trial court’s discretion.

During his closing argument, the trial court sustained several objections by the State when defendant tried to discuss his wife “using [his] kids against” him and mentioned his wife’s “nasty letters.” The transcript reveals that although the trial court sustained the objections, defendant continued to talk about the letters. Likewise, when the trial court sustained an objection to defendant talking about C.H. allegedly holding a knife to his throat, defendant had already twice before mentioned this allegation. Our close review of the trial transcript shows that the trial court gave defendant, acting *pro se*, wide latitude in both his cross-examinations and closing argument. Defendant repeatedly and extensively discussed his theory that C.H. and L.R. were not being truthful and were out to get him. The

STATE v. REID

[204 N.C. App. 122 (2010)]

trial court also allowed defendant to cross-examine C.H. about their relationship and her alleged dislike of defendant. The trial court acted appropriately and within its discretion in preventing the waste of time by needlessly repetitive testimony. *Long*, 113 N.C. App. at 771, 440 S.E.2d at 579. Defendant's assignments of error five and six are dismissed.

III

[3] In his final argument, defendant contends that "the trial court erred by allowing [him] to represent himself when the pre-trial hearing and the trial [were] filled with indications that defendant was mentally ill and not able to represent himself, or, in the alternative, for allowing jailers to seize defendant's legal papers at night when he returned to jail denying him the right to represent himself." We disagree. Defendant failed to properly preserve his alternative argument for appellate review and we dismiss defendant's assignment of error seven. As to defendant's assignment of error eight, regarding his alleged mental illness, we find no error.

Defendant begins the third argument in his brief with an extended assertion about the alleged ineffectiveness of his court-appointed counsel prior to her withdrawal and appointment as his standby counsel. However, defendant did not assign error on this point and thus, his ineffective assistance of counsel argument is not before us.

Defendant then acknowledges that the trial court conducted the review required by N.C. Gen. Stat. § 15A-1242 before allowing him to proceed *pro se*, but contends that the trial court was "under the misapprehension that [it] couldn't force [him] to have a court-appointed attorney." Defendant states that "the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." *Indiana v. Edwards*, — U.S. —, —, 171 L. Ed. 2d 345, 357 (2008). As defendant notes, *Edwards* involved a defendant who had been previously ruled incompetent to stand trial twice and who had diagnosed mental illness including schizophrenia. *Id.* at —, 171 L. Ed. 2d at 351. Defendant agrees that his case is factually distinguishable from *Edwards*, but asserts that his pretrial motions and claims indicated delusional thinking and mental illness. We disagree.

As discussed above, defendant's written motions and some of his arguments during the pretrial hearing indicate that he was confused

STATE v. REID

[204 N.C. App. 122 (2010)]

about what elements were required to be proved under various statutes. However, this is not clear evidence of delusional thinking but rather of the confusion one might expect of a layperson grappling with our State's complicated statutes relating to sexual offenses. The transcript reveals that defendant formed a coherent theory of his case: that he and C.H. engaged in consensual sex rather than rape, and that C.H. lied about consenting because she disliked him. Defendant stuck to this theory throughout the trial and attempted to find support for it during his cross-examination of the State's witnesses. Defendant then summed up his theory and argued it during his closing statement. Defendant was able to file a written motion to dismiss and to renew that motion appropriately at the close of all evidence. He was able to make the decision not to testify, which would have opened him up to cross-examination and attacks on his credibility. Given the evidence against him, specifically medical evidence and testimony from C.H. supporting the rape charge and witness testimony about his difficult relationship with C.H., defendant appears to have made a strategic decision to admit sexual contact but contest rape. This decision may have been unsuccessful and may even have been ill-advised, but it does not reflect mental illness, delusional thinking, or a defendant who "lacks the mental capacity to conduct his trial defense unless represented." *Id.* at —, 171 L. Ed. 2d at 355. The trial court did not err in allowing defendant to represent himself after complying with the requirements of N.C.G.S. § 15A-1242. In fact, the trial court conducted an extensive inquiry regarding defendant's ability represent himself.

As to defendant's alternative argument, that defendant was denied his constitutional rights to represent himself and present his defense because jailers seized his legal papers, we conclude that he did not preserve this issue for appellate review. At trial, defendant made no motion or objection on constitutional grounds before the trial court. *Hunter*, 305 N.C. at 112, 286 S.E.2d at 539.

In any event, defendant cannot show error. The transcript reveals that, outside the presence of the jury at approximately 9 a.m. on 23 January 2009, defendant reported to the trial court that someone at the jail had "ambushed" him that morning and taken his legal papers. The trial court asked defendant to look through his materials to insure that he had all his papers. Defendant stated that he did have everything. The trial court went further and asked defendant twice more to make sure he had everything he needed and that his papers were in order; defendant said he was ready to proceed. After the jury

FISH HOUSE, INC. v. CLARKE

[204 N.C. App. 130 (2010)]

was brought in, the trial court again asked defendant if needed a few minutes to get organized and when defendant said he was unsure, the trial court called a ten minute recess so that defendant could further prepare himself. The trial court then confirmed that defendant was ready to proceed. In his brief, defendant contends that he was prevented from preparing his defense and compares the incident to “the Government tak[ing] a lawyer’s work product for the evening, preventing him or her from preparing for the next day’s court examinations and arguments[.]” Defendant’s legal papers were not taken overnight; even if someone at the jail had “seized” his papers that morning, defendant acknowledged to the trial court that he had everything back at 9 a.m. At no point did defendant suggest that he was unprepared for court or hindered in any way by the incident. In context, defendant appears to have been concerned with being “ambushed.” This interpretation is further supported by his reference to the incident during the sentencing hearing, when defendant stated that he had been “attacked” during the incident. When defendant raised this issue, both at trial and during sentencing, the trial court made a point of clarifying that defendant had not been physically attacked, had access to his materials during the evening in his cell, had all his materials when he arrived in court, and was organized and prepared to proceed. Defendant does not show that he was prevented from representing himself or presenting his defense.

Dismissed in part; no error.

Judges STROUD and BEASLEY concur.

FISH HOUSE, INC., PLAINTIFF v. PATRICE C. CLARKE, DEFENDANT

No. COA09-1047

(Filed 18 May 2010)

1. Trespass— navigable waters—public trust doctrine

The trial court did not err in dismissing plaintiff’s trespass action because the manmade canal upon which defendant allegedly trespassed was a navigable waterway held by the State in trust for all citizens of North Carolina pursuant to the public trust doctrine.

FISH HOUSE, INC. v. CLARKE

[204 N.C. App. 130 (2010)]

2. Jurisdiction— subject matter—standing—navigable waters

Plaintiff's argument that the trial court erred in determining whether a canal was navigable because defendant had no standing to litigate the rights of the State of North Carolina was overruled because defendant raised navigable waters as a defense to plaintiff's trespass claim and was not seeking monetary damages for interference with navigable waters.

3. Trespass— title to land—immaterial—navigable waters

Plaintiff's argument that the trial court erred in dismissing its trespass claim because it was immaterial that plaintiff did not allege title to the land in question was dismissed because the canal at issue was navigable water subject to the public trust doctrine.

4. Waters and Adjoining Lands— navigable canal in its entirety—no error

The trial court did not err in determining that a canal was navigable in its entirety because plaintiff's complaint did not limit its trespass claim to any particular portion of the canal and defendant did not limit its defense of navigability to a specific portion of the canal.

Appeal by Plaintiff from an order entered 12 February 2009 by Judge Quentin T. Sumner in Hyde County Superior Court. Heard in the Court of Appeals 10 February 2010.

Vandeventer Black LLP, by Norman W. Shearin, Jr. and Allison Holmes Pant, for Plaintiff.

Pritchett & Burch, PLLC, by Lloyd C. Smith, Jr., Jonathan E. Huddleston, and S. Adam Stallings, for Defendant.

BEASLEY, Judge.

Fish House, Inc. (Plaintiff) appeals from an order denying its motion for partial summary judgment and dismissing its trespass action and all claims alleged therein. Because we agree with the trial court that the canal through which Patrice C. Clarke (Defendant) has allegedly trespassed is navigable waters, and therefore subject to the public trust doctrine, we affirm.

Plaintiff and Defendant own adjacent tracts of land in the Village of Engelhard, North Carolina, upon which they each operate their

FISH HOUSE, INC. v. CLARKE

[204 N.C. App. 130 (2010)]

respective fish houses. Plaintiff purchased three contiguous parcels (the “Fish House Parcels”) from its principals pursuant to a deed executed on 22 June 1992. Far Creek, LLC (who was a co-plaintiff in this action but filed notice of voluntary dismissal under Rule 41(a)) purchased the Fish House Parcels on 30 August 2005 and leased the land back to Plaintiff. Therefore, since 1992, Plaintiff has been and remains in possession of the Fish House Parcels, either pursuant to the lease or as record owner thereof. Located on the western border of Plaintiff’s property and to the east of Defendant’s lies a canal called the Old Sam Spencer Ditch (the “Canal”). Defendant has consistently allowed boats to enter upon the Canal and tie up on the western side.

Plaintiff commenced a trespass action against Defendant by filing a complaint on 9 October 2007 to enjoin her from using the Canal. In Defendant’s answer, she moved to dismiss the trespass action pursuant to Rule 12(b)(6) on the grounds that Plaintiff’s leasehold interest is not sufficient to confer a viable claim. Defendant raised as affirmative defenses adverse possession, prescriptive easement, and navigable waters, and asserted several counterclaims. Defendant filed a motion for summary judgment on 8 December 2008, and Plaintiff filed a motion for partial summary judgment for dismissal of Defendant’s counterclaims the following day. A motions hearing was held at the 12 January 2009 civil session of Martin County Superior court. The trial court found that neither party was entitled to judgment as a matter of law and denied both parties’ summary judgment motions. Defendant’s motion to dismiss, which was converted to a summary judgment motion at the hearing, for lack of standing was also denied. Finally, the trial court found that the waters of the Old Sam Spencer Ditch are navigable waters in which the State of North Carolina has public trust rights. Accordingly, the trial court concluded that neither party has any rights in the waters of the Canal except as members of the public and, therefore, dismissed the action in its entirety. Plaintiff appealed from this order.

STANDARD OF REVIEW

“Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted).

“Under the public trust doctrine, the lands under navigable waters ‘are held in trust by the State for the benefit of the public’ and

FISH HOUSE, INC. v. CLARKE

[204 N.C. App. 130 (2010)]

'the benefit and enjoyment of North Carolina's submerged lands is available to all its citizens, subject to reasonable legislative regulation, for navigation, fishing and commerce.' " *Parker v. New Hanover Cty.*, 173 N.C. App. 644, 653, 619 S.E.2d 868, 875 (2005) (quoting *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527, 369 S.E.2d 825, 828 (1988)); see also N.C. Gen. Stat. § 1-45.1 (2007) (codifying the public trust doctrine and extending its protections to "the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State"). "Though 'the extent of the public trust ownership of North Carolina is confused and uncertain[,] the Supreme Court of North Carolina has affirmed original state ownership of . . . lands under all waters navigable-in-fact.'" *Bauman v. Woodlake Partners, LLC*, — N.C. App. —, —, 681 S.E.2d 819, 824 (2009) (quoting Thomas J. Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C. L. Rev. 1, 17 (1970-71)).

Our Supreme Court has clarified the law on navigability in the context of the public doctrine succinctly: "[A]ll watercourses are regarded as navigable in law that are navigable in fact." *Gwathmey v. State of North Carolina*, 342 N.C. 287, 300, 464 S.E.2d 674, 682 (1995) (quoting *State v. Baum*, 128 N.C. 600, 604, 38 S.E. 900, 901 (1901)); see also *State v. Twiford*, 136 N.C. 603, 606, 48 S.E. 586, 587 (1904) ("[I]f a stream is 'navigable *in fact* . . . it is navigable in law.' "). The Court has explained that "if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose." *Gwathmey*, 342 N.C. at 301, 464 S.E.2d at 682. Those lands submerged under such waters that are navigable in law are the subject of the North Carolina public trust doctrine. See *id.*

I.

[1] Plaintiff argues that the trial court committed reversible error in dismissing its trespass action because even if the Old Sam Spencer Ditch is "navigable," Plaintiff is entitled to exclude Defendant therefrom. We disagree.

Plaintiff cites *Vaughn v. Vermillion*, 62 L. Ed. 2d 365, 444 U.S. 206 (1979) and *Kaiser Aetna v. United States*, 62 L. Ed. 2d 332, 444 U.S. 164 (1979) for the proposition that the privately owned, manmade waterways in those cases did not become open to use by all United States citizens simply because it joined with other navigable waterways. These cases, however, address the laws of the United States regarding the general public use of navigable waters in the context of

FISH HOUSE, INC. v. CLARKE

[204 N.C. App. 130 (2010)]

interstate commerce. Plaintiff never addresses the rights enjoyed by the citizens of North Carolina under the Public Trust Doctrine, based upon which the trial court's order was rendered, and the cases cited are inapposite thereto.

We agree with the trial court and Defendant that the Canal, although manmade, is a navigable waterway held by the state in trust for all citizens of North Carolina.

This Court recently stated that “the public ha[s] the right to [] unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are *in their natural condition* capable of such use.” *Bauman*, — N.C. App. at —, 681 S.E.2d at 824 (quoting *Gwathmey*, 342 N.C. at 300, 464 S.E.2d at 682). The question here is whether the test for navigability is different when applied to a manmade canal. “*Gwathmey* clearly states that the public has a right to unobstructed navigability of waters in their natural state.” *Id.* at —, 681 S.E.2d at 824-25. However, it is not whether the waterway itself is natural or artificial but, rather, “[w]ater that is navigable in its natural state flows without diminution or obstruction.” *Id.* at —, 681 S.E.2d at 825 (citing *Wilson v. Forbes*, 13 N.C. 30, 35 (1828)). The South Carolina case of *Hughes v. Nelson*, 303 S.C. 102, 399 S.E.2d 24 (1990), is instructive, as it addresses very similar facts under a similar state law providing for common law rights of the public in navigable water. The issue before the South Carolina Court of Appeals was “whether the waters of the canal are navigable waters, making the canal a public highway, or whether, on the other hand, the canal is private property, like a privately owned road.” *Id.* at 104, 399 S.E.2d at 25. Moreover, the test for navigability used by the South Carolina courts is akin to that employed in North Carolina, such that the court's analysis in *Hughes* is particularly persuasive. *See id.* at 105, 399 S.E.2d at 25 (“The true test to be applied is whether a stream inherently and by its nature has the capacity for valuable floatage, irrespective of the fact of actual use or the extent of such use.”).

The court in *Hughes* held that “[t]he fact that a waterway is artificial, not natural, is not controlling. When a canal is constructed to connect with a navigable river, the canal may be regarded as a part of the river.” *Id.*; *see also State ex rel. Medlock v. S.C. Coastal Council*, 289 S.C. 445, 448, 346 S.E.2d 716, 718 (1986) (holding canals and ditches, dug by rice planters for the purpose of water control but used thereafter by the general public as natural waterways, “have become the functional equivalent of natural streams”); *State v.*

FISH HOUSE, INC. v. CLARKE

[204 N.C. App. 130 (2010)]

Columbia Water Power Co., 82 S.C. 181, 186, 63 S.E. 884, 887 (1909) (stating that a canal constructed to improve the navigability of two navigable rivers becomes “a part of those rivers, and therefore navigable just as any other portion of them is navigable”). Accordingly, the court in *Hughes* concluded that the canal which was privately constructed to connect with a navigable river, had the capacity for navigation, and had indeed been navigated for the past fifteen years without exclusion of the public was navigable water.

Although the North Carolina authority on this issue is sparse, the N.C. Department of Environment and Natural Resources, Division of Coastal Management (DCM) likewise suggests that our test for navigability does not discriminate between natural and artificial waterways. The DCM, in its CAMA [Coastal Area Management Act] Handbook for Development in Coastal Carolina, defines navigable waters and identifies the various public trust areas. The handbook identifies public trust areas as, *inter alia*: (1) “all navigable natural water bodies and the lands underneath;” (2) “all water in artificially created water bodies that have significant public fishing resources and are accessible to the public from other waters;” and (3) “all waters in artificially created water bodies where the public has acquired rights by prescription, custom, usage, dedication or any other means.” Division of Coastal Management, N.C. Dep’t of Env’t & Natural Res., *CAMA Handbook for Development in Coastal North Carolina* § 2(A)(1), <http://dcm2.enr.state.nc.us/Handbook/section2.htm>. In *Pine Knoll Assn. v. Cardon*, this Court stated, without dispute, that Plaintiff and defendant own adjoining canal front properties on the dead end canal of Davis Landing Canal, which is navigable by pleasure boats, and described the canal as a navigable waterway. 126 N.C. App. 155, 157, 484 S.E.2d 446, 447 (1997). In light of the preceding authority, we hold that the controlling law of navigability concerning the body of water in its natural condition reflects only upon the manner in which the water flows without diminution or obstruction. Therefore, any-waterway, whether manmade or artificial, which is capable of navigation by watercraft constitutes navigable water under the public trust doctrine of this state.

Here, there is no dispute that boats with a length of thirty (30) feet have navigated the Old Sam Spencer Ditch or that Defendant and other members of the public have used the Canal for commercial purposes in excess of twenty (20) years. Several affidavits setting forth the navigability and historical use of the Canal, which remain uncon-

FISH HOUSE, INC. v. CLARKE

[204 N.C. App. 130 (2010)]

tested by Plaintiff, indicate that the Old Sam Spencer Ditch is indeed navigable water and subject to the public trust doctrine. Therefore, we hold the trial court did not err in dismissing Plaintiffs action for trespass against Defendant to enjoin her from using these waters held in trust by the state for the benefit of the public.

II.

[2] Plaintiff argues that even if the waters of the Canal are navigable, the trial court erred in determining their navigability because Defendant has no standing to litigate the rights of the State of North Carolina. Plaintiff contends that the issue of navigable waters is not a defense or a claim available to Defendant. We disagree.

Standing implicates a courts subject matter jurisdiction and may be raised at any time, even on appeal. *Woodring v. Swieter*, 180 N.C. App. 362, 366-67, 637 S.E.2d 269, 274-75 (2006).

Although Plaintiff is correct that no party has the standing to litigate the rights of the state, Defendant in this case raised navigable waters as an affirmative defense to Plaintiffs trespass action. Our courts have held that private litigants lack standing to sue for damage to public lands, including navigable waters. *See Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 42, 621 S.E.2d 19, 27-28 (2005) (holding that because of the unique nature of the public trust doctrine, this is a claim that may only be raised by a sovereign). This Court stated: “As such, the public trust doctrine cannot give rise to an assertion of ownership that would be available to any ‘private litigants in like circumstances.’” *Id.* at 41-42, 621 S.E.2d at 27 (citation omitted).

The state is the sole party able to seek non-individualized, or public, remedies for alleged harm to public waters. Under the public trust doctrine, the State holds title to the submerged lands under navigable waters, but it is a title of a different character than that which it holds in other lands. It is a title held in trust for the people of the state so that they may navigate, fish, and carry on commerce in the waters involved.

Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 118-19, 574 S.E.2d 48, 54 (2002) (internal quotations omitted).

Defendant is not seeking monetary damages for interference with navigable waters but, rather, merely raises the doctrine as a defense to Plaintiffs trespass claim and to preserve the publics rights to the Canal under the public trust doctrine. *Cf. Bauman*, — N.C. App. —,

FISH HOUSE, INC. v. CLARKE

[204 N.C. App. 130 (2010)]

681 S.E.2d 819 (allowing the class action suit brought by riparian owners against defendants who had begun charging a toll for use of the lake to proceed). Although the lake in *Bauman* was ultimately not deemed navigable, this Court did not prohibit the plaintiffs from invoking the public trust doctrine where they merely wanted access to the lakes allegedly navigable waters, free from interference and charge. Similarly, Defendant invokes the public trust doctrine, not to litigate the rights of the state, but to ensure that Plaintiff does not prevent her from enjoying those rights. Accordingly, we hold the trial court did not err in deciding that the waters of the canal were navigable because Defendants standing is not an issue.

III.

[3] Plaintiff argues that the trial court committed reversible error in dismissing its trespass action because it is immaterial that Plaintiff does not allege title to the land in question. Pursuant to the discussion above, the trial courts proper determination that the Canal at issue is navigable water subject to the public trust doctrine means exactly that no party can attain possessory rights therein sufficient to support a trespass cause of action. Accordingly, Plaintiffs argument is meritless, and we dismiss this assignment of error.

IV.

[4] Lastly, Plaintiff argues that the trial court committed reversible error in adjudicating the rights in the eastern half of the Canal because there was no dispute between the parties as to that portion of the Old Sam Spencer Ditch. We disagree.

The relief granted by the trial court is proper when consistent with the claims pleaded and embraced within the issues presented to the court. *NCNB v. Carter*, 71 N.C. App. 118, 322 S.E.2d 180 (1984). Not only did Plaintiffs complaint fail to limit the action to any particular portion of the Canal, but Defendant also raised the issue of navigability of the Canal, without specifying which portion, as an affirmative defense and as a counterclaim in her answer. Therefore, the issue of navigability of the entire canal was properly before the trial court, and the judge did not err in adjudicating the Canal as navigable in its entirety.

In conclusion, we affirm the order of the trial court.

Affirmed.

Chief Judge MARTIN and Judge HUNTER, JR. concur.

IN RE D.R.F.

[204 N.C. App. 138 (2010)]

IN THE MATTER OF: D.R.F., A MINOR CHILD

No. COA09-1716

(Filed 18 May 2010)

1. Appeal and Error— termination of parental rights—failure to appeal from adjudication order

Respondents' argument that the trial court erred in terminating their parental rights to their minor child based upon neglect was not properly preserved for appellate review. Because respondents only appealed from the dispositional order, the adjudication order in which the minor child was adjudicated neglected remained valid and final.

2. Termination of Parental Rights— disposition—best interests of the child—no abuse of discretion

The trial court did not abuse its discretion in a termination of parental rights case by ordering the minor child be adopted by the child's foster parents instead of placing the child in kinship placement. The trial court made findings of fact concerning the statutory factors in N.C.G.S. § 7B-1110(a) and clearly considered the child's best interests.

3. Appeal and Error— preservation of issues—failure to make a motion to recuse trial judge

Respondent-father failed to preserve for appellate review his argument that the trial judge in a termination of parental rights case erred by failing to recuse himself from the termination of parental rights hearing after having recused himself from a permanency planning hearing in the same case. The trial judge was not required to recuse himself *sua sponte* and respondent failed to move for the trial judge's recusal when the trial judge presided over the adjudication and disposition hearings.

Appeal by respondents from an order entered 1 October 2009 by Judge J. Carlton Cole in Chowan County District Court. Heard in the Court of Appeals 26 April 2010.

W. Hackney High, Jr., for Chowan County Department of Social Services, petitioner-appellee.

N.C. Administrative Office of the Courts, by Appellate Counsel Pamela Newell, for Guardian ad Litem.

IN RE D.R.F.

[204 N.C. App. 138 (2010)]

*Peter Wood, for respondent-appellant mother.**Jeffrey L. Miller, for respondent-appellant father.*

JACKSON, Judge.

Both respondent-father and respondent-mother (“respondents”) appeal the 1 October 2009 order terminating their parental rights to the minor child, D.R.F. For the reasons stated herein, we affirm.

Respondents are the natural parents of D.R.F., who was born in September 2007. When D.R.F. was born, the Chowan County Department of Social Services (“DSS”) already had custody of respondent-mother’s three older children, and respondent-father was in jail on three counts of child abuse based upon his interactions with respondent-mother’s other children. DSS took custody of D.R.F. on 6 November 2007 after respondent-mother violated orders prohibiting her from having any contact with respondent-father and from allowing her children to have any contact with him. On 7 November 2007, D.R.F. was placed with a licensed foster care family (“foster parents”) with whom she continues to reside. Following a hearing on 19 December 2007, the trial court adjudicated D.R.F. a neglected juvenile and ordered, *inter alia*, that DSS remain responsible for the care and placement of D.R.F., that respondents be allowed supervised visits with D.R.F. at the discretion of DSS, and that respondents comply with the requirements of their case plans.

At both the 19 December 2007 and 19 March 2008 hearings, respondents were ordered to provide information as to relatives who may be able to care for D.R.F., but neither respondent could suggest an appropriate placement. At a 2 September 2008 meeting, almost ten months after D.R.F. was taken into DSS custody, respondents first informed DSS that respondent-father’s aunt and her husband (“paternal relatives”) were willing to be considered as a placement for D.R.F. The paternal relatives were unaware of D.R.F.’s being in foster care until September 2008. Beginning on 11 October 2008, D.R.F. had regular visits with her paternal relatives. A kinship assessment of the paternal relatives revealed “no issues or concerns.”

On 21 October 2008, based upon a permanency planning hearing held on 3 September 2008, the trial court ordered concurrent plans of reunification of D.R.F. with respondents and guardianship with a relative or adoption. Following another permanency planning hearing, the trial court entered a 5 November 2008 order “reliev[ing] [DSS] of its duty to use reasonable efforts to prevent the need for the place-

IN RE D.R.F.

[204 N.C. App. 138 (2010)]

ment of [D.R.F.]” and requiring DSS to “work[] towards the permanent plan of guardianship with a relative or adoption.” On 20 November 2008, the trial judge recused himself from the permanency planning hearing scheduled for 17 December 2008, but the reason for the recusal is not set forth in the record before us. Another trial judge presided over the 17 December 2008 and 13 January 2009 permanency planning hearings and ordered, *inter alia*, that the permanent plan for D.R.F. be adoption by her foster parents, that DSS proceed with filing an action to terminate respondents’ parental rights, and that the paternal relatives continue to have a minimum of four hours of visitation with D.R.F. each month.

On 13 March 2009, DSS filed a motion to terminate respondents’ parental rights. At the 18 June 2009 adjudication hearing, both respondents, through counsel, stipulated to a finding of past neglect. In a 7 August 2009 adjudication order, the trial court found that grounds existed for termination based upon respondents’ stipulation, testimony from the social worker, and prior court orders. During several dispositional hearings, the trial court heard evidence as to the appropriateness of placement with the paternal relatives as compared to adoption by the foster parents, including the recommendation of D.R.F.’s guardian *ad litem* (“GAL”) that “it is still in the best interest of the child that she be placed with the relatives (aunt and uncle).” In a 1 October 2009 order, the trial court found, *inter alia*, that “it is in [D.R.F.’s] best interest to be adopted by the foster family” and granted DSS’s motion for termination of respondents’ parental rights. The trial judge who previously had recused himself from a permanency planning hearing presided over both the adjudication and disposition hearings. Respondents appeal the 1 October 2009 order.

Initially, we note that respondent-mother and respondent-father filed separate briefs to this Court. However, two of their arguments—the sufficiency of the trial court’s findings as to neglect and the trial court’s potential abuse of discretion in preferring adoption by the foster parents to placement with the paternal relatives—coincide. The final argument discussed herein—whether the trial judge erred in failing to recuse himself from the termination of parental rights hearing—is raised only by respondent-father.

[1] Respondents first contend that the trial court’s termination of their parental rights based upon neglect was erroneous, because the stipulation was not sufficient to support a finding of neglect and the trial court made no finding as to the likelihood of repetition of

IN RE D.R.F.

[204 N.C. App. 138 (2010)]

neglect. Because respondents did not appeal the 7 August 2009 adjudication order, we do not address this argument.

“[Rule 3(d) of the North Carolina Rules of Appellate Procedure] requires that a notice of appeal designate the order from which appeal is taken.” *In re A.L.A.*, 175 N.C. App. 780, 782, 625 S.E.2d 589, 590-91 (2006). An order remains final and valid when no appeal is taken from it. *In re Wheeler*, 87 N.C. App. 189, 194, 360 S.E.2d 458, 461 (1987). In an unpublished opinion, which is not binding on this Court but which we find persuasive, application of these principles required us to decline to review an adjudication order from which respondent-mother had failed to appeal. *In re D.D.*, 182 N.C. App. 765, 643 S.E.2d 83, 2007 WL 1119687 (unpublished). See *Kelly v. Kelly*, 167 N.C. App. 437, 443, 606 S.E.2d 364, 369 (2004).

In the case *sub judice*, respondents appeal only the 1 October 2009 disposition order, according to their respective notices of appeal. Therefore, the 7 August 2009 adjudication order remains valid and final, and we do not address respondents’ alleged errors as to that order.

[2] Second, respondents argue that the trial court abused its discretion when it preferred adoption by D.R.F.’s foster parents, who have cared for her since 7 November 2007, over a kinship placement. We disagree.

A termination of parental rights proceeding is held in two phases, the adjudication stage and the disposition stage. *In re Mills*, 152 N.C. App. 1, 6, 567 S.E.2d 166, 169 (2002). Once a trial court has concluded during the adjudication phase that grounds exist for termination of parental rights, it must decide in the disposition phase whether termination is in the best interests of the child. *Id.* at 7, 567 S.E.2d at 169-70. The trial court’s decision as to the best interests of the child is discretionary. *Id.* at 7, 567 S.E.2d at 170. “A ruling committed to a trial court’s discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

North Carolina General Statutes, section 7B-1110(a) provides six factors that trial courts must consider when making a determination as to a child’s best interest:

- (1) The age of the juvenile.
- (2) The likelihood of adoption of the juvenile.

IN RE D.R.F.

[204 N.C. App. 138 (2010)]

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2007). The General Assembly also has set forth its intent with respect to the State's termination of parental rights statutes, which includes, *inter alia*:

(2) It is the further purpose of this Article to recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents.

(3) Action which is in the best interests of the juvenile should be taken in all cases where the interests of the juvenile and those of the juvenile's parents or other persons are in conflict.

N.C. Gen. Stat. § 7B-1100 (2007).

In the instant case, the trial court made findings of fact that mirror the statutory considerations. In its 1 October 2009 order, it found, *inter alia*:

7. The juvenile was approximately six weeks old when [DSS] assumed custody of the juvenile and was approximately 22 months old at the time of the August 29, 2009 hearing in this matter.

....

19. The juvenile is now almost two years old and at that age is likely to be adopted.

20. The [] foster parents have long expressed a willingness and strong desire to adopt the juvenile and as such there is a high likelihood the juvenile will be adopted.

21. The adoption of the juvenile by the [foster parents] will accomplish the goal of the permanent plan for the juvenile.

....

IN RE D.R.F.

[204 N.C. App. 138 (2010)]

23. The bond between the juvenile and the [] foster parents, as proposed adoptive parents, is strong.

24. There is little bond between the juvenile and the juvenile's parents to the extent that such bond is practically non-existent.

. . . .

33. Since November 7, 2007 the [] foster parents have provided the juvenile with a safe, loving, caring and stable home.

In addition to these findings that address the relevant factors in North Carolina General Statutes, section 7B-1110(a), the trial court made extensive findings as to the relative situations of the foster parents and D.R.F.'s paternal relatives. It also specifically provided its reasons for determining that D.R.F.'s best interests would be served by termination of parental rights and subsequent adoption by her foster parents:

56. The [c]ourt's primary concern is a safe permanent home for the juvenile within a reasonable amount of time and the [paternal relatives], although currently able to provide the juvenile a proper home, were unable to provide the juvenile a safe permanent home within a reasonable time after the juvenile was taken into custody due to circumstances not within the control of the [paternal relatives] but due to circumstances which were within the control of the [respondents].

57. That if the [paternal relatives] were ordered to have placement of the juvenile the [paternal relatives] would view their role as caretakers of the juvenile until such time that the parents were living their lives in a way and manner such that the [c]ourt would return placement to the parents, whereas the [c]ourt is looking for a plan that would be more permanent for the juvenile.

58. The [c]ourt is aware of policy and statutory provisions regarding relative placement priority of juveniles and is of the opinion that the [] foster parents provided the juvenile with a safe permanent home within a reasonable time and that no relatives presented themselves to the [c]ourt or [DSS] in a reasonable time to provide the juvenile a safe permanent home.

Based upon these findings of fact, in addition to the numerous others within the order, the trial court clearly considered the best interests of D.R.F. thoroughly, and we cannot say that its decision to terminate respondents' parental rights "was so arbitrary that it could not have

IN RE D.R.F.

[204 N.C. App. 138 (2010)]

been the result of a reasoned decision.” *White*, 312 N.C. at 777, 324 S.E.2d at 833.

[3] Respondent-father’s final argument is that the trial judge erred by failing to recuse himself from the termination of parental rights hearing after having recused himself from a permanency planning hearing in the same case. We disagree.

The North Carolina Code of Judicial Conduct sets forth instances in which a party’s motion for recusal of a judge should be granted. Code of Judicial Conduct Canon 3(C), 2010 Ann. R. N.C. 518-19.¹ It then notes that “[n]othing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge’s own initiative.” Code of Judicial Conduct Canon 3(D), 2010 Ann. R. N.C. 519. “While this provision certainly encourages a judge to recuse himself or herself in cases where his or her ‘impartiality may reasonably be questioned’ upon their [sic] own motion, they [sic] are not required to do so in the absence of a motion by a party.” *In re Key*, 182 N.C. App. 714, 719, 643 S.E.2d 452, 456 (2007) (quoting Code of Judicial Conduct Canon 3, 2007 Ann. R. N.C. 446).

“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]” N.C. R. App. P. 10(a)(1) (2009). When a party does not move for a judge’s recusal at trial, the issue is not preserved for our review. *In re Key*, 182 N.C. App. at 719, 643 S.E.2d at 456 (citing *State v. Love*, 177 N.C. App. 614, 627-28, 630 S.E.2d 234, 243 (2006)).

Here, the trial judge offered no reason for his original recusal but simply decreed as part of the 20 November 2008 order, “Upon his own motion, [the trial judge] recuse[s] himself from the hearing on the permanent plan scheduled for December 17, 2008.” Respondent-father concedes that when the same trial judge later presided over both the adjudication and disposition hearings in this case, he did not move for recusal. Respondent-father contends that we should consider this alleged error one “which by rule or law was deemed preserved” N.C. R. App. P. 10(a)(1) (2009). We decline to treat this situation as one in which preservation is automatic. Because the trial judge has no duty to recuse himself *sua sponte*, because we have no indication of the reasons underlying this trial judge’s initial recusal or

1. Canon 3 was amended last in 2006. Therefore, the 2010 version of the North Carolina Code of Judicial Conduct reflects the same principles that were applicable during the proceedings at issue here.

N.C. FARM BUREAU MUT. INS. CO., INC. v. SADLER

[204 N.C. App. 145 (2010)]

whether those reasons continued to exist, and most importantly, because this issue was not preserved for our review, we hold that the trial judge did not err by failing to recuse himself from the adjudication and disposition hearings in this case.

For these reasons, we hold that respondents' arguments as to the 7 August 2009 adjudication order were not preserved. We also hold that the trial court did not abuse its discretion in preferring adoption by the foster parents to placement with the paternal relatives nor did the trial judge err in presiding over the termination of parental rights hearing after he had recused himself from an earlier proceeding.

Affirmed.

Chief Judge MARTIN and Judge BEASLEY concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PLAINTIFF
v. GERVIS E. SADLER, INDIVIDUALLY AND BY AND THROUGH STEVE ANTHONY
SADLER, HIS ATTORNEY-IN-FACT, DEFENDANT

No. COA09-1054

(Filed 18 May 2010)

1. Appeal and Error— interlocutory order and appeal—Rule 54(b) certification

Plaintiff's appeal from the grant of a partial summary judgment order in favor of defendant was certified for immediate appeal under N.C.G.S. § 1A-1, Rule 54(b).

2. Insurance— homeowner's insurance—partial summary judgment—breach of contract—appraisal process

The trial court did not err in a declaratory judgment action seeking an appraisal amount for a homeowner's insurance claim by granting partial summary judgment in favor of defendant on a counterclaim for breach of contract and awarding defendant the full appraisal value for damage to the house caused by wind. Defendant presented sufficient evidence of a disagreement as to the value of the damage to enter into the appraisal process under the terms of the insurance policy. Further, the trial court's appointment of an umpire absent a representative appraiser by plaintiff

N.C. FARM BUREAU MUT. INS. CO., INC. v. SADLER

[204 N.C. App. 145 (2010)]

insurance company was proper. Appraisal awards are assumed to be valid and binding absent evidence of fraud, duress, or other impeaching circumstances.

Appeal by plaintiff from judgment entered 21 May 2009 by Judge William C. Griffin, Jr. in Hyde County Superior Court. Heard in the Court of Appeals 10 February 2010.

Young Moore and Henderson, P.A., by Walter E. Brock, Jr. and Matthew J. Gray, for plaintiff-appellant.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., and Ledolaw, by Michele A. Ledo, for defendant-appellee.

BRYANT, Judge.

Plaintiff North Carolina Farm Bureau (Farm Bureau) appeals from an order granting defendant Gervis Sadler (Sadler) partial summary judgment on a counterclaim for breach of contract and awarding Sadler \$150,000.00 plus interest from the date of breach. For the reasons stated herein, we affirm.

On 1 September 2005, Sadler submitted a home owner's insurance claim to Farm Bureau for damage to his house occurring during a wind storm on 6 May 2005. Farm Bureau initially denied the claim but, after a request to re-assess the property, estimated Sadler's damages to be valued at \$3,203.03 "for roof damage and damage due to roof damage." On 18 May 2006, Farm Bureau issued Sadler a check for \$3,203.03. The check went uncashed, and on 5 June 2006, Sadler provided Farm Bureau with the following notice:

[W]e feel like there is a lot more you should have covered. We have talked to some friends of ours that have used the appraisal process to work these sort of things out. This process sounds like it would work perfect and we would like to use it. Please go ahead and name the parties you intend to represent you. We are talking to . . . some other folks about being our representative. As soon as we get someone to agree to it we will give you their name."

On 22 June 2006, Sadler retained Lewis O'Leary as his representative in the appraisal process. Farm Bureau did not immediately respond. On 30 June 2006, the trial court entered an order appointing Martin Overbolt to serve as umpire for the parties' respective appraisers.

N.C. FARM BUREAU MUT. INS. CO., INC. v. SADLER

[204 N.C. App. 145 (2010)]

On 31 July 2006, Farm Bureau retained appraiser Rick Manning. In his summary report, Manning stated that his “inspection was to determine damages from wind which allegedly came from a storm on May 6, 2005.” Manning noted damage to roof shingles, water stains on interior ceiling, mold growth, and termite damage. Manning assessed the value of loss at \$31,561.39.

On 1 February 2008, Umpire Overbolt and Sadler’s appraiser agreed on an appraisal amount of \$162,500.00. Farm Bureau filed a complaint for declaratory relief in which it argued among other things that the appraisal award was not covered by the homeowner’s policy. Sadler counterclaimed alleging breach of policy/contract, breach of covenant of good faith, and unfair claim settlement practices.

On 21 May 2009, the trial court entered an order granting partial summary judgment in favor of Sadler, concluding that no genuine issue of material fact existed with respect to Sadler’s counterclaim for breach of contract and that considering the categorical limits of Sadler’s homeowner’s insurance policy and the pertinent deductible Sadler was “entitled to summary judgment against Farm Bureau in the amount of \$150,500, plus interest” The order was certified for immediate appeal pursuant to Rule 54(b). Farm Bureau appeals.

[1] “An order is interlocutory if it does not determine the entire controversy between all of the parties.” *Romig v. Jefferson-Pilot Life Ins. Co.*, 132 N.C. App. 682, 684, 513 S.E.2d 598, 600 (1999) (citation omitted).

[From an interlocutory order,] a party may appeal where the trial court enters a final judgment with respect to one or more, but less than all of the parties or claims, and the court certifies the judgment as immediately appealable under Rule 54(b) of the North Carolina Rules of Civil Procedure. . . . [T]he burden is on the appellant to present appropriate grounds for this Court’s acceptance of an interlocutory appeal and our Court’s responsibility to review those grounds.

Id. at 685, 513 S.E.2d at 600 (internal citations omitted).

Farm Bureau argues that the trial court entered a final judgment as to Sadler’s counterclaim for breach of contract. We agree and note that the trial court’s order substantially determines the action in favor of Sadler. Further, as previously noted, the trial court certified the

N.C. FARM BUREAU MUT. INS. CO., INC. v. SADLER

[204 N.C. App. 145 (2010)]

order for immediate appeal. Therefore, we consider the merits of Farm Bureau's appeal.

On appeal, Farm Bureau raises the following three arguments: did the trial court err in granting Sadler's motion for summary judgment for the full amount of the appraisal award where (I) Sadler violated the policy in obtaining the appraisal award; (II) the policy states that the appraisal award is subject to reduction; and (III) Farm Bureau did not waive the policy limitations applicable to the appraisal award.

Under our Rules of Civil Procedure, Rule 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c) (2007). "[W]hen considering a summary judgment motion, all inferences of fact must be drawn against the movant and in favor of the party opposing the motion. We review a trial court's order granting or denying summary judgment de novo." *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 353-54 (2009) (internal citations, quotations, and ellipsis omitted).

I

[2] Farm Bureau first questions whether the trial court erred in granting Sadler's motion for summary judgment and awarding him the full appraisal value for damage to the house. Farm Bureau contends that Sadler violated the terms of his policy by (a) engaging in an appraisal that purported to determine causation and policy coverage as opposed to mere value loss, (b) failing to demonstrate a genuine disagreement as to the amount of loss prior to demanding an appraisal, and (c) failing to allow the appraisers the contracted time to reach an agreement on a suitable umpire prior to obtaining the exparte appointment of an umpire by the trial court. We separately address each contention.

A

Farm Bureau contends that Sadler violated the terms of his insurance policy by submitting an appraisal that included the date and the cause of the damage to the Sadler house, beyond merely providing the value of the loss. We disagree.

N.C. FARM BUREAU MUT. INS. CO., INC. v. SADLER

[204 N.C. App. 145 (2010)]

To support its position, Farm Bureau cites *High Country Arts and Crafts Guild v. Hartford Fire Ins. Co.*, 126 F.3d 629 (4th Cir. 1997), where the appraisers determined “the period of coverage under the business interruption provisions of the policy in question should be limited to sixty days.” *Id.* at 631. The Court held that “the policy conferred on appraisers only the right to determine ‘the amount of loss,’ and consequently the parties [were] not to be bound by the appraisers’ determinations of coverage issues.” *Id.* at 634. The matter before us is distinguishable.

In the instant case both parties acknowledged at some point that the determination of loss was based on wind damage. Farm Bureau’s appraiser, Manning, stated that his “inspection [of the Sadler house] was to determine damages from wind which allegedly came from a storm on May 6, 2005.” Sadler’s appraiser also identified the date of the loss as 6 May 2005 and the cause of the damage as wind. Therefore, this scenario, where the appraisers were informed of or identified the likely cause of damage to the property and considered that cause when assessing the property for damage and loss of value, is distinguishable from that in *High Country Arts*. The appraisers in *High Country Arts* reviewed the insurance policy at issue and in essence interpreted its content, then limited the scope of their assessment to the extent of damage they interpreted the policy to cover.

Here, the appraisers were clearly informed as to the cause of damage—wind—and assessed Sadler’s property for loss of value considering the type of damage that may have resulted from such a cause. The appraisers’ individual notes on the likely cause and date of damage do not indicate an interpretation of Sadler’s homeowner’s insurance policy. We think the following language from a federal court in Delaware makes this point quite cogently. “Indeed, to the extent that the appraisers’ assessment may overlap with a coverage question, the parties certainly may seek the Court’s ultimate review. However, . . . it would be inappropriate to curtail the appraisal process simply because it might come shoulder-to-shoulder with subsequent legal questions.” *CIGNA Ins. Co. v. Didimoi Prop. Holdings*, N.V., 110 F. Supp. 2d 259, 269 (D. Del. 2000). We note the additional compelling language stated by the *CIGNA* Court.

As a general matter, public policy favors alternate resolution procedures like the appraisal process. If the Court were to curtail the appraisers authority to include only dollar value assessments without regard for whether the property was damaged as a result of the [cause insured against], the Court would be reserving a

N.C. FARM BUREAU MUT. INS. CO., INC. v. SADLER

[204 N.C. App. 145 (2010)]

plethora of detailed damage assessments for judicial review, thereby debunking the purpose of appraisal which is to minimize the need for judicial intervention.

Id. It would be impractical for an appraiser to make a value determination for potentially insured damages without acknowledging the cause. Therefore, we overrule this argument.

B

Farm Bureau argues that Sadler failed to demonstrate a genuine disagreement as to the amount of loss before demanding an appraisal. Farm Bureau cites *Hailey v. Auto-Owners Ins. Co.*, 181 N.C. App. 677, 640 S.E.2d 849 (2007) in support of its argument.

In *Hailey*, the plaintiff claimed that his properties were damaged and filed damage claims with the defendant. The defendant made payment on the claims. Subsequently, the plaintiff discovered that the payments were insufficient to cover his losses and invoked his insurance policy's appraisal clause, appointed an appraiser, and requested that the defendant do the same. *Id.* at 678, 640 S.E.2d at 850. On appeal, this Court reasoned that the plaintiff's disagreement with the amount proffered by the defendant was unilateral: the plaintiff failed to communicate to the defendant any amount of loss greater than the amount already paid. We held that "the unsupported opinion of the insured that the insurer's payment was insufficient does not rise to the level of a disagreement necessary to invoke appraisal." *Id.* at 687, 640 S.E.2d at 855. The facts of the instant case are distinguishable.

Here, Sadler gave notice of his claim on 1 September 2005. In a letter to Farm Bureau, Sadler stated that a night storm occurred on 6 May 2005, and following the storm, shingles were missing from his roof. Farm Bureau denied the claim. On 18 May 2006, per Sadler's request, a Farm Bureau adjuster assessed the property and estimated the value of the damage to be \$3,203.03. Farm Bureau issued a check for this amount. Sadler did not cash the check, and on 5 June 2006, Sadler informed Farm Bureau that he felt as though "there is a lot more [Farm Bureau] should have covered" and that others in similar situations had "used the appraisal process to work these sort of things out. This process sounds like it would work perfect [sic] and [I] would like to use it." We hold that Sadler presented sufficient evidence of a disagreement as to the value of the damage done to his house to enter into the appraisal process under the terms of the insurance policy.

N.C. FARM BUREAU MUT. INS. CO., INC. v. SADLER

[204 N.C. App. 145 (2010)]

C

Farm Bureau argues that Sadler prematurely obtained the *ex parte* appointment of an umpire. We disagree.

“Under North Carolina law, when the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court . . .” *Fin. Servs. of Raleigh, Inc. v. Barefoot*, 163 N.C. App. 387, 395, 594 S.E.2d 37, 42 (2004) (citation and quotations omitted).

Here, the insurance policy contains the following pertinent provision:

If you and we fail to agree on the value or amount of any item or loss, either may demand an appraisal of such item or loss. In this event, each party will choose a competent and disinterested appraiser within 20 days after receiving a written request from the other. The two appraisers will choose a competent and impartial umpire. If they cannot agree upon an umpire within 15 days, you or we may request that a choice be made by a judge of a court of record in the state where the insured premises is located.

In a letter dated 5 June 2006, Sadler gave notice to Farm Bureau that he disagreed with Farm Bureau’s assessed value of loss, and that he would utilize his insurance policy’s appraisal process to determine the value of loss. Furthermore, Sadler stated that Farm Bureau should “go ahead and name the parties [Farm Bureau] intended to represent [it].” Within twenty days of the 5 June 2006 letter, Sadler selected Lewis O’Leary as his representative. Farm Bureau did not reply to Sadler’s letter or give notice of its representative in the appraisal process until 31 July 2006. However, over twenty days after Sadler’s notice to begin the appraisal process but prior to Farm Bureau giving notice of the person who would represent it, the trial court entered an order which stated that “[Farm Bureau] failed to appoint their choice of appraisers on a timely basis, in violation of the policy provision to do so. Pursuant to the insurance contract, it is ordered that Martin Overbolt is hereby appointed to serve as the Umpire.”

Farm Bureau failed to adhere to the terms of Sadler’s insurance policy by failing to appoint an appraiser within twenty days of receiving Sadler’s notice of utilizing the appraisal process to determine the value of loss, and furthermore, failed to appoint an appraiser within a month of the close of the applicable twenty-day window. Therefore,

N.C. FARM BUREAU MUT. INS. CO., INC. v. SADLER

[204 N.C. App. 145 (2010)]

we hold the trial court's appointment of an umpire absent a representative appraiser by Farm Bureau was proper. Accordingly, Farm Bureau's arguments are overruled.

II & III

Next, Farm Bureau argues that the trial court erred in granting partial summary judgment and awarding the full value of the appraisal award where genuine issues of material fact exist as to whether the appraisal award is subject to reduction due to policy coverages, exclusions, limitations and conditions. Furthermore, Farm Bureau argues that it did not waive and is not estopped from enforcing its policy terms and exclusions. Farm Bureau argues that there remain genuine issues of material fact as to whether Sadler's damages resulted from wind or causes specifically excluded, such as long-term water leaks and lack of flashing around the windows, settlement of the foundation, and expansion and contraction of framing and finishes due to seasonal moisture changes. We disagree.

"[A]ppraisal provisions are analogous to arbitrations, in that they provide a mechanism whereby the parties can rapidly and inexpensively determine the amount of property loss without resorting to court process." *Harleysville Mut. Ins. Co. v. Narron*, 155 N.C. App. 362, 368, 574 S.E.2d 490, 494 (2002) (citation and quotations omitted). "[T]his Court has held that if the contractual appraisal provisions are followed, an appraisal award is presumed valid and is binding absent evidence of fraud, duress, or other impeaching circumstances." *N.C. Farm Bureau Mut. Ins. Co. v. Harrell*, 148 N.C. App. 183, 185, 557 S.E.2d 580, 581 (2001) (citation and quotations omitted).

Here, the insurance policy states that "[i]f [the appraisers] fail to agree, they will submit their differences to the umpire. *A decision agreed to by any two will set the amount of loss.*" (Emphasis added). Farm Bureau does not suggest that fraud, duress, or other impeaching circumstances occurred during the appraisal process; therefore, we hold the trial court did not err in granting partial summary judgment to Sadler for the amount of the appraisal award. Accordingly, we overrule Farm Bureau's assignments of error.

Affirmed.

Judges ELMORE and STROUD concur.

STATE v. LACKEY

[204 N.C. App. 153 (2010)]

STATE OF NORTH CAROLINA v. RICKY EARLE LACKEY

No. COA09-1069

(Filed 18 May 2010)

1. Jury— instructions—Allen charge—no error

The trial court in a possession of cocaine case did not commit plain error by giving the jury an *Allen* instruction after the jury had deliberated for an hour and a half and before the jury retired to continue deliberations. The instruction was in accordance with N.C.G.S. § 15A-1235 (a) and (b) and was not an abuse of discretion.

2. Sentencing— not cruel and unusual punishment—habitual felon

Defendant's argument that his prison sentence of 84 to 110 months was grossly disproportionate to his crime of possession of 0.1 grams of cocaine and constituted cruel and unusual punishment was overruled. Defendant did not argue that he suffered from an abuse of discretion, procedural misconduct, circumstances which manifested an inherent unfairness or injustice, or conduct offending a public sense of fair play and defendant was sentenced as an habitual felon in accordance with N.C.G.S. § 14-7.6.

3. Jury— individual polling—no error

The trial court did not err by failing to separately inquire whether the jurors in a possession of controlled substance case assented to the verdicts in the jury room and in the courtroom. The clerk asked each individual juror in open court whether the verdict announced was his or her verdict, which met the requirements of N.C.G.S. § 15A-1238.

Appeal by defendant from judgment entered 20 February 2009 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 10 February 2010.

Attorney General Roy Cooper, by Assistant Attorney General Letitia C. Echols, for the State.

Sofie W. Hosford for defendant-appellant.

STATE v. LACKEY

[204 N.C. App. 153 (2010)]

BRYANT, Judge.

Defendant Ricky Lackey appeals from a judgment entered after a jury found him guilty of felony possession of cocaine and defendant pled guilty to attaining habitual felon status. For the reasons stated herein, we find no error.

On 29 August 2009, Johnston County Deputy Sheriff John Canady pulled over defendant after noticing that defendant's license plate was registered to a 1999 Saturn; defendant was driving an S-10 Chevrolet Blazer. With defendant's consent, the deputy searched the vehicle for weapons or illegal narcotics and discovered a small amount of what appeared to be "crack" cocaine. Defendant was placed under arrest and indicted on possession of cocaine, maintaining a vehicle to keep or sell controlled substances, and having obtained habitual felon status. The State later dismissed the charge of maintaining a vehicle to keep or sell controlled substances.

At trial, after the close of the State's case-in-chief, defendant made a motion to dismiss the charges. The motion was denied. Defendant did not present any evidence. The trial court instructed the jury on the charge of possession of cocaine, and the jury retired for deliberation. Approximately an hour later, the judge received a note that the jury was "not able to render a verdict as [they were] voting 11-1." The trial court, with the consent of both the prosecutor and defendant, recalled the jury to the courtroom and instructed them in accordance with N.C.P.I. Criminal Charge 101.40, entitled failure of the jury to reach a verdict. The jury further deliberated for an additional thirty minutes before the trial court called the jury to the courtroom and recessed for the evening with an instruction to reconvene the next morning.

The next morning, before the jury retired to continue its deliberations, the trial court gave an instruction in accordance with N.C. Gen. Stat. § 15A-1235 (a) and (b). After further deliberation, the jury returned a verdict of guilty on the charge of possession of cocaine. Defendant entered a plea of guilty on the charge of attaining the status of a habitual felon. The trial court sentenced defendant to a term of 84 to 110 months in the custody of the North Carolina Department of Correction. Defendant appeals.

On appeal, defendant raises the following arguments: (I) did the trial court err in providing the jury with an *Allen* instruction; (II) did defendant's prison sentence constitute cruel and unusual punish-

STATE v. LACKEY

[204 N.C. App. 153 (2010)]

ment; and (III) did the trial court permit the courtroom clerk to improperly poll the jurors.

I

[1] Defendant first argues that the trial court abused its discretion or committed plain error in providing the jury with a second *Allen* charge¹, after the jury announced it was deadlocked. We disagree.

Under North Carolina General Statutes, section 15A-1235, our General Assembly has codified the standard applicable for charges which are to be given a jury that is apparently unable to agree upon a verdict—an *Allen* instruction.

(a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.

(b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:

(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

1. See *Allen v. United States*, 164 U.S. 492, 41 L. Ed. 528 (1896).

STATE v. LACKEY

[204 N.C. App. 153 (2010)]

N.C. Gen. Stat. § 15A-1235 (2009). Our Supreme Court has held that such an instruction is permissive rather than mandatory and, thus, within the trial court's discretion. *See State v. Williams*, 315 N.C. 310, 326, 338 S.E.2d 75, 85 (1986) (citing N.C.G.S. § 15A-1235(c)). However, when a trial court gives an instruction authorized under N.C.G.S. § 15A-1235(b), the trial court must instruct the jury in accordance with all of the instructions under § 15A-1235(b). On appeal, in determining whether a court's instructions forced a verdict or merely served as a catalyst for further deliberations, "an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury." *State v. Peek*, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985) (citation omitted). However, where the defendant failed to object to the instruction outside of the presence of the jury, our review is limited to a determination of plain error. *See* N.C. R. App. P. 10(c); *Williams*, 315 N.C. at 328, 338 S.E.2d at 86.

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Cummings, 361 N.C. 438, 470, 648 S.E.2d 788, 807 (2007) (citation omitted) (original emphasis).

Here, after an hour of deliberation, the jury foreman sent the trial court a note stating that the jury was "not able to render a verdict as [they were] voting 11-1." The trial court recalled the jury to the courtroom and, with the consent of the prosecutor and defendant, instructed them in accordance with N.C.P.I. Criminal Charge 101.40, failure of the jury to reach a verdict.

Members of the jury, you are reminded that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women in an effort to reconcile your differences, if you can, without the surrender of

STATE v. LACKEY

[204 N.C. App. 153 (2010)]

you conscientious convictions. No juror should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors are [sic] for the mere purpose of returning a verdict.

At this time I'm going to allow you to resume your deliberations and to continue your efforts to reach a verdict. Thank you.

The jury then returned to deliberate for thirty minutes before the trial judge recessed court for the evening. The next morning, before the jury retired to continue deliberations, the trial court gave the following instruction:

Members of the jury, before you retire for your deliberations this morning, I do want to remind you that, in order to return a verdict, all twelve juror [sic] must agree to the verdict of "guilty" or "not guilty." Jurors do have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment. Each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with his or her fellow jurors.

In the course of deliberations, a juror should not hesitate to reexamine his or her own views and to change his or her own opinion if convinced it is erroneous. However, no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of his or her fellow jurors or for the mere purpose of reaching a verdict.

We hold the trial court's instruction, given before deliberations resumed, was in accordance with the standard for instructions to be given when a jury is unable to agree as set out in N.C.G.S. § 15A-1235 (a) and (b) and was not an abuse of discretion, much less plain error. Accordingly, we overrule defendant's argument.

II

[2] Next, defendant argues that the trial court's sentence of 84 to 110 months was grossly disproportionate to his crime of possession of 0.1 grams of cocaine and constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States. We disagree.

Under North Carolina General Statutes, section 14-7.1, "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon." N.C. Gen. Stat. § 14-7.1.

STATE v. LACKEY

[204 N.C. App. 153 (2010)]

“When an habitual felon as defined in this Article commits any felony under the laws of the State of North Carolina, the felon must, upon conviction or plea of guilty under indictment as provided in this Article . . . be sentenced as a Class C felon.” N.C. Gen. Stat. § 14-7.6. “[L]egislation which is designed to identify habitual criminals and which authorizes enhanced punishment has withstood eighth amendment challenges.” *State v. Todd*, 313 N.C. 110, 119, 326 S.E.2d 249, 254 (1985) (citations omitted). “[And,] only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment’s proscription of cruel and unusual punishment.” *Id.* (citations omitted). However,

[a]bsent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

State v. Ysagwire, 309 N.C. 780, 786, 309 S.E.2d 436, 440-41 (1983) (citation omitted). As previously stated by our Supreme Court, “the proper review involves a determination [under Structured Sentencing] of whether there has been a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness or injustice, or conduct which offends the public sense of fair play.” *Todd*, 313 N.C. at 119, 326 S.E.2d 249, 254. See also, *Rummel v. Estelle*, 445 U.S. 263, 63 L. Ed. 2d 382 (1980) (holding that the defendant’s life sentence imposed under a recidivist statute, after the defendant was convicted of obtaining \$120.75 by false pretenses, did not constitute cruel and unusual punishment in violation of the Eight and Fourteenth Amendments).

Here, defendant does not argue that he suffered from an abuse of discretion, procedural misconduct, circumstances which manifested an inherent unfairness or injustice, or conduct offending a public sense of fair play. Indeed, the trial court found that the mitigating factors outweighed the aggravating factors and sentenced defendant, who had a prior record level IV², to a term within the mitigated range

2. Defendant’s criminal convictions spanned twenty-two years and included convictions for armed robbery, possession with intent to sell and deliver cocaine, and forgery.

STATE v. LACKEY

[204 N.C. App. 153 (2010)]

for a Class C felony. Therefore, we hold that defendant's sentence to a term of 84 to 110 months in prison for possession of cocaine, as an habitual felon, did not offend the proscription against cruel and unusual punishment as stated in the Eighth and Fourteenth Amendments. Accordingly, defendant's argument is overruled.

III

[3] Last, defendant argues that the trial court erred in allowing the courtroom clerk to improperly poll the jurors. Defendant contends that by failing to separately inquire whether the jurors assented to the verdicts in the jury room and in the courtroom, defendant's right to a proper jury poll was denied. We disagree.

The Constitution of North Carolina establishes that “[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court.” N.C. Const. art. I, sec. 24. Under North Carolina General Statutes, section 15A-1238, “[u]pon the motion of any party made after a verdict has been returned and before the jury has dispersed, the jury must be polled. . . . The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his verdict.” N.C. Gen. Stat. § 15A-1238.

Here, the trial court received a note that the jury had reached a unanimous verdict. Recalled to the courtroom, the jury foreman stated that the jury had reached a unanimous verdict. The verdict sheet was handed to the trial court and read out loud for the record. “We, the jury, returned as our unanimous verdict that the Defendant Ricky Earle Lackey is guilty of possession of cocaine.” The trial court instructed the jurors to verify that this was their verdict by raising their right hands. All of the jurors raised their right hands. Defendant made a motion to poll the jury, after which the courtroom clerk conducted the following voir dire:

THE CLERK: [Juror 4], would you stand?

[Juror 4]: [Stood]

THE CLERK: As foreperson on the jury, you have returned for the unanimous verdict of the jury, “We, the jury, return as you unanimous verdict that the Defendant Ricky Earle Lackey is guilty of possession of cocaine.” Is this your verdict, and do you still assent thereto?

[Juror 4]: Yes.

COLLIER v. COLLIER

[204 N.C. App. 160 (2010)]

The clerk proceeded to question each of the remaining jurors individually, and in each instance, the juror responded in the affirmative. We hold that this process, whereby the clerk asked each individual juror in open court whether the verdict announced was his or her verdict, meets the requirements of N.C. Gen. Stat. § 15A-1238. Accordingly, we overrule defendant's argument.

No error.

Judges ELMORE and STROUD concur.

JOHN S. COLLIER AND BRYAN COLLIER, INDIVIDUALLY AND ON BEHALF OF THE PANILLA CORPORATION, PLAINTIFFS v. JUDITH J. COLLIER, AS SOLE DIRECTOR AND VICE PRESIDENT OF THE PANILLA CORPORATION AND PANILLA CORPORATION, DEFENDANTS

No. COA09-786

(Filed 18 May 2010)

Corporations— issuance of share certificates—summary judgment

The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claim that defendant corporation should be required to bring a claim against defendant individual to recover sale proceeds, and requesting share certificates be reissued to plaintiffs. Plaintiffs could only prevail by proving that share certificates were actually issued to them in compliance with N.C.G.S. § 55-6-25. There was no forecast of evidence of the total number of shares issued, and the percentages owned by the various alleged shareholders would be impossible to determine.

Appeal by plaintiffs from order entered 9 December 2008 by Judge James C. Spencer, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 5 November 2009.

Tenney & Tenney, LLP by Brian H. Tenney, for plaintiff-appellants.

Clifton & Singer, LLP, by Benjamin F. Clifton, Jr., for defendants-appellees.

COLLIER v. COLLIER

[204 N.C. App. 160 (2010)]

STROUD, Judge.

Plaintiffs appeal order granting summary judgment in favor of defendants. For the following reasons, we affirm.

I. Background

Plaintiffs John S. Collier and Bryan Collier alleged in their 22 January 2008 verified complaint that they are shareholders in the Panilla Corporation (“Panilla”) but have lost their Certificates of Shares (“share certificates”). Plaintiffs further alleged that defendant Judith Collier wrongfully sold real property belonging to Panilla and kept the proceeds for her own personal use. Plaintiffs requested that Panilla be required to bring a claim against Judith Collier to recover the sale proceeds and that their share certificates be reissued to them. On or about 26 March 2008, defendants Judith Collier and Panilla answered plaintiffs’ complaint and filed a motion to dismiss. On or about 12 September 2008, defendants filed a motion for summary judgment. In its 9 December 2008 order the trial court granted summary judgment in favor of defendants. Plaintiffs appeal.

II. Summary Judgment**A. Standard of Review**

Summary judgment should be allowed when

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A trial court’s grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party.

Fairway Outdoor Adver. v. Edwards, — N.C. App. —, —, 678 S.E.2d 765, 768-69 (2009) (citation omitted). Furthermore, although the trial court made numerous findings of fact in its order granting summary judgment,

[s]ummary judgment should be entered only where there is no genuine issue as to any material fact. If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper. There is no necessity for findings of fact where facts are not at issue, and summary judgment presupposes that there are no triable issues of material fact. Although findings of fact are not necessary on a motion for summary judgment, it is

COLLIER v. COLLIER

[204 N.C. App. 160 (2010)]

helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment. The “Findings of Fact” entered by the trial judge, insofar as they may resolve issues as to a material fact, have no effect on this appeal and are irrelevant to our decision.

Ins. Agency v. Leasing Corp., 26 N.C. App. 138, 142, 215 S.E.2d 162, 164-65 (1975) (citations omitted). We therefore do not consider the findings of fact made by the trial court but will review *de novo* whether summary judgment was properly granted. See *Fairway Outdoor Adver.* at —, 678 S.E.2d at 769; *Ins. Agency* at 142, 215 S.E.2d 162, 165.

B. Genuine Issues of Material Fact

Plaintiffs first contend that the trial court erred in concluding that there was no genuine issue of material fact. Plaintiffs argue there is a genuine issue of material fact as to whether they were shareholders. “A genuine issue is one which can be maintained by substantial evidence.” *Board of Educ. of Hickory v. Seagle*, 120 N.C. App. 566, 569, 463 S.E.2d 277, 280 (1995) (citation omitted), *disc. review improvidently allowed per curiam*, 343 N.C. 509, 471 S.E.2d 63 (1996).

Shares may or may not be represented by certificates. See N.C. Gen. Stat. § 55-6-25(a) (2007). Plaintiffs did not allege that they owned shares without certificates; rather, plaintiffs allege that they owned shares which had certificates, but the certificates were lost. If a share is represented by a certificate,

[a]t minimum each share certificate must state on its face:

- (1) The name of the issuing corporation and that it is organized under the law of North Carolina;
- (2) The name of the person to whom issued; and
- (3) The number and class of shares and the designation of the series, if any, the certificate represents.

N.C. Gen. Stat. § 55-6-25(b) (2007). The share certificate must also “be signed (either manually or in facsimile) by two officers designated in the bylaws or by the board of directors[.]” N.C. Gen. Stat. § 55-6-25(d) (2007). Thus, plaintiffs can only prevail by proving that share certificates were actually issued to them in compliance with N.C. Gen. Stat.

COLLIER v. COLLIER

[204 N.C. App. 160 (2010)]

§ 55-6-25. Plaintiffs' only forecast of evidence that share certificates were issued is alleged in their complaint, their answers to defendants' requests for admissions, and Bryan Collier's affidavit; however, both the complaint and answers to defendants' requests for admissions simply repeat the same allegations as Bryan Collier's affidavit and assert no additional evidence that share certificates were issued to the plaintiffs.

We thus turn to Bryan Collier's affidavit which averred that he had seen share certificates issued in the names of himself, his brother John S. Collier, his half-sister, Pamela Marie Collier, his father, and his defendant stepmother. However, Bryan Collier's affidavit fails to establish a genuine issue of material fact as it does not "maintain[] by substantial evidence" the information needed to prove that plaintiffs were shareholders. *Board of Educ. of Hickory* at 569, 463 S.E.2d at 280. Even assuming *arguendo* that eyewitness testimony alone could be sufficient to establish the existence of share certificates, here the affidavit fails to provide necessary information about the alleged certificates. The affidavit does not state the number of shares issued or that the share certificates were signed by two officers as required pursuant to N.C. Gen. Stat. § 55-6-25(b), (d). *See* N.C. Gen. Stat. § 55-6-25(b), (d); *Board of Educ. of Hickory* at 569, 463 S.E.2d at 280. Plaintiffs' complaint alleges "[t]hat on information and belief the Plaintiffs believing it to be true that Certificates of Shares were issued for Fifty (50) shares to each of the Plaintiffs[.]" However, plaintiffs fail to forecast any evidence for this "belief[.]" In fact, the only individual whom plaintiffs claim saw their Certificates of Shares, Bryan Collier, stated in his affidavit that he did "not recall the exact number of shares on each certificate." Thus, there is no forecast of evidence as to the total number of shares issued, and the percentages owned by the various alleged shareholders would be impossible to determine. Without "substantial evidence" that Panilla issued share certificates in compliance with N.C. Gen. Stat. § 55-6-25, plaintiffs cannot demonstrate that they were "shareholders" of Panilla and therefore cannot prevail in their lawsuit. The trial court properly concluded that there was "no genuine issue as to any material fact[.]" *Fairway Outdoor Adver.* at —, 678 S.E.2d at 769; *Board of Educ. of Hickory* at 569, 463 S.E.2d at 280. This argument is overruled.

C. Entitled to Judgment as a Matter of Law

Plaintiffs next contend that "the Defendants were not entitled to judgment as a matter of law[.]" Plaintiffs rely solely on their argument

STATE v. NUNEZ

[204 N.C. App. 164 (2010)]

that Bryan Collier's affidavit created a genuine issue of material fact. As we have already established plaintiffs failed to establish a genuine issue of material fact because plaintiffs failed to bring forth evidence as required by N.C. Gen. Stat. § 55-6-25 to demonstrate that share certificates were actually issued in compliance with the law of North Carolina, defendants were entitled to judgment as a matter of law, as without evidence of share certificates issued in compliance with N.C. Gen. Stat. § 55-6-25 plaintiffs cannot prevail at trial. We reiterate that had plaintiffs alleged they were issued stock without certificates an entirely different analysis would have taken place pursuant to N.C. Gen. Stat. § 55-6-26; however, because plaintiffs alleged that they were issued certificates, they must show compliance with N.C. Gen. Stat. § 55-6-25. This argument is overruled.

III. Conclusion

We conclude that the trial court properly granted summary judgment in favor of defendants.

AFFIRMED.

Judges STEPHENS and BEASLEY concur.

STATE OF NORTH CAROLINA v. STEPHANIE NICOLE NUNEZ

No. COA09-1236

(Filed 18 May 2010)

1. Drugs— trafficking in marijuana—motion to dismiss—sufficient evidence

The trial court did not err in denying defendant's motion to dismiss trafficking in marijuana charges because the State presented sufficient evidence of all the elements of the offenses, including that defendant had knowledge that boxes delivered to her apartment contained controlled substances, for the charges to be submitted to the jury.

2. Sentencing— consecutive sentences—two trafficking in marijuana offenses

The trial court erred in imposing consecutive sentences as a matter of law on defendant for his convictions of two trafficking

STATE v. NUNEZ

[204 N.C. App. 164 (2010)]

in marijuana offenses. While N.C.G.S. § 90-95 mandates that when sentencing a defendant for trafficking in marijuana pursuant to subsection (h) of N.C.G.S. § 90-95, the trial court must run the sentence consecutively to any sentence the defendant is currently serving, it does not mean that when a defendant is convicted of multiple trafficking offenses at a term of court that those sentences, as a matter of law, must run consecutively to each other. The trial court had the discretion to run defendant's sentences consecutively or concurrently.

Appeal by defendant from judgments entered 16 April 2009 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 24 March 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Victoria L. Voight, for the State.

James W. Carter for defendant-appellant.

STEELMAN, Judge.

The State introduced sufficient circumstantial evidence for the trafficking in marijuana charges to be submitted to the jury. Pursuant to N.C. Gen. Stat. § 90-95(h), when a defendant is convicted of multiple drug trafficking offenses at the same term of court, the trial court has the discretion to run the sentences either consecutively or concurrently.

I. Factual and Procedural Background

On 27 June 2006, a police drug dog alerted the Greenville Police to two suspicious packages at the United Parcel Service (UPS) hub in Greenville. A search warrant was obtained, and the packages were searched. They each contained two 5-gallon paint cans sealed in plastic wrap. Inside the cans was marijuana, weighing a total of 25.5 pounds.

The packages were addressed to "Holly Wright," 2429 Charles Boulevard, Number 19 in Greenville. Holly Wainwright (Wainwright) and Stephanie Nicole Nunez (defendant) had shared the apartment, but Wainwright had moved out prior to 27 June 2006. A controlled delivery of the packages was organized for later that day. The packages were delivered, accepted by defendant, and dragged into the apartment by defendant. Defendant then called her boyfriend, Dia Smallwood (Smallwood), and advised him that the packages had

STATE v. NUNEZ

[204 N.C. App. 164 (2010)]

arrived. Shortly thereafter, Smallwood pulled up, opened the hatchback of his vehicle, and entered the apartment. Police executed a search warrant for the apartment and found Smallwood holding one of the packages. Smallwood dropped the package and bolted from the apartment.

Defendant and Smallwood were both charged with drug offenses. Defendant was indicted for two counts of trafficking in marijuana; by possession and transportation. Defendant was also indicted for possession with intent to sell and deliver marijuana, two counts of conspiracy to traffic in marijuana; by possession and transportation, felony maintaining of a dwelling for controlled substances, and possession of drug paraphernalia.

On 16 April 2009, a jury found defendant guilty of the four trafficking offenses, the charge of possession of drug paraphernalia, and of the lesser-included offense of possession of marijuana. Defendant was found not guilty of maintaining a dwelling for controlled substances. The trial court arrested judgment on the conspiracy charges, the possession of marijuana charge, and the possession of drug paraphernalia charge. Defendant was sentenced to two consecutive terms of active imprisonment of 25-30 months on the remaining two trafficking offenses.

Defendant appeals.

II. Motion to Dismiss at the Close of the State's Evidence

[1] In her first argument, defendant contends that the trial court erred in not dismissing each of the charges. We disagree.

Because the trial court arrested judgment on the conspiracy offenses, the possession of marijuana charge, and the possession of drug paraphernalia charge, defendant's assignments of error pertaining to those charges are dismissed. *State v. Roman*, — N.C. App. —, —, S.E.2d —, — (2010).

A. Standard of Review

"The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (internal citations omitted). The question upon review is "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State*

STATE v. NUNEZ

[204 N.C. App. 164 (2010)]

v. Blizzard, 169 N.C. App. 285, 289, 610 S.E.2d 245, 249 (2005) (citation and quotations omitted). In considering the motion, the trial court must view the evidence in the light most favorable to the State and give the State every reasonable inference. *State v. Thaggard*, 168 N.C. App. 263, 281, 608 S.E.2d 774, 786 (2005) (citing *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995)).

B. Sufficiency of the Evidence

While each of the trafficking offenses contains slightly different elements, defendant's argument focuses solely upon one element; whether defendant had knowledge that the boxes delivered to her apartment contained controlled substances.

The class H felony of trafficking in marijuana by transportation requires the State to prove (1) that defendant knowingly transported the marijuana, and (2) that the marijuana weighed more than 10 pounds, but less than 50 pounds. N.C. Gen. Stat. § 90-95(h)(1)(a) (2009); *see also* N.C.P.I., Crim. 260.30.

The class H felony of trafficking in marijuana by possession requires the State to prove (1) that defendant knowingly possessed the marijuana, and (2) that the marijuana weighed more than 10 pounds, but less than 50 pounds. N.C. Gen. Stat. § 90-95(h)(1)(a) (2009); *see also* N.C.P.I., Crim. 260.17. The possession element can be proven by showing that defendant had both the power and intent to control the disposition or use of the marijuana. *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 885 (1984) (citations omitted). Defendant's "possession may be either actual or constructive." *Id.* (citation omitted). We note that both defendant and the State discuss at length the concept of constructive possession in their briefs. Defendant accepted both packages from the UPS delivery person and dragged the packages into her apartment. Defendant thus had actual, not constructive, possession of the packages, and the principles of constructive possession are irrelevant to our analysis of this case.

Defendant argues that the State failed to establish that she had knowledge that the packages contained marijuana. "Knowledge" is defined as, "[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact." Black's Law Dictionary 950 (9th ed. 2009).

Knowledge is a mental state and may be proved by the conduct and statements of the defendant, by statements made to him by

STATE v. NUNEZ

[204 N.C. App. 164 (2010)]

others, by evidence of reputation which it may be inferred had come to his attention, and by circumstantial evidence from which an inference of knowledge might reasonably be drawn.

State v. Boone, 310 N.C. 284, 294-95, 311 S.E.2d 552, 559 (1984) (citations omitted).

In the absence of a confession by defendant that she knew the boxes contained marijuana, the State's proof of this element must of necessity be circumstantial. "[C]ircumstantial evidence is that which is indirectly applied by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred." *State v. Blackwelder*, 182 N.C. 899, 904, 109 S.E. 644, 647 (1921). The law makes no distinction between the weight to be given to either direct or circumstantial evidence. *State v. Shuka*, 107 N.C. App. 200, 204, 419 S.E.2d 200, 203 (1992) (citation omitted).

The State presented the following evidence, which was sufficient circumstantial evidence to submit the charges to the jury: (1) the packages were addressed to "Holly Wright," a person who no longer lived in the apartment with defendant; (2) defendant immediately accepted possession of the packages, dragged them into the apartment, and never mentioned to the delivery person that Wainwright no longer lived there; (3) Wainwright testified that she had not ordered the packages; (4) defendant told a neighbor that Smallwood had ordered the packages for her; (5) defendant did not open the packages, but she immediately called Smallwood to tell him the packages had arrived; (6) after getting off the phone with Smallwood, defendant acted like she was in a hurry to leave; and (7) Smallwood came to the apartment within thirty-five minutes of the packages being delivered.

" 'In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury ' " *State v. Jenkins*, 167 N.C. App. 696, 701, 606 S.E.2d 430, 433 (quoting *State v. Jackson*, 103 N.C. App. 239, 244, 405 S.E.2d 354, 357 (1991) (internal quotations and citations omitted), *aff'd*, 331 N.C. 113, 413 S.E.2d 798 (1992)), *aff'd*, 359 N.C. 423, 611 S.E.2d 833 (2005). Both *Jenkins* and *Jackson* involved the charges of trafficking in drugs and of conspiracy to traffic in drugs, and the submission of these offenses to the jury based upon the sufficiency of circumstantial evidence.

We hold that the State presented sufficient circumstantial evidence that defendant had knowledge that the contents of the pack-

STATE v. NUNEZ

[204 N.C. App. 164 (2010)]

ages contained controlled substances for the cases to be submitted to the jury.

This argument is without merit.

III. Consecutive Sentences

[2] In her second and third arguments, defendant contends that the trial court erred in imposing consecutive sentences for the two trafficking in marijuana offenses. We agree and remand these cases to the trial court for a new sentencing hearing.

Defendant was sentenced for two counts of trafficking in marijuana. At the sentencing hearing, the prosecutor told the trial judge that under the provisions of N.C. Gen. Stat. § 90-95(h)(6), the trial court was required as a matter of law to run the two sentences consecutively to each other. The trial court expressed skepticism concerning this, but defense counsel agreed with the prosecutor. In sentencing defendant on the second trafficking charge, the trial court stated: “This sentence to be served at the expiration of the sentence imposed in Count 1 as required by law.”

N.C. Gen. Stat. § 90-95 provides that, “[s]entences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.” N.C. Gen. Stat. § 90-95(h)(6) (2009). This language mandates that when sentencing a defendant for trafficking in marijuana pursuant to subsection (h) of N.C. Gen. Stat. § 90-95, the trial court must run the sentence consecutively to “any sentence being served” by the defendant. This means that if the defendant is already serving a sentence, the new sentence under N.C. Gen. Stat. § 90-95(h) must run consecutively to that sentence. It does not mean that when a defendant is convicted of multiple trafficking offenses at a term of court that those sentences, as a matter of law, must run consecutively to each other. When this occurs, the trial court has the discretion to run the sentences either consecutively or concurrently. *State v. Bozeman*, 115 N.C. App. 658, 662-63, 446 S.E.2d 140, 143 (1994); *State v. Walston*, 193 N.C. App. 134, 141, 666 S.E.2d 872, 877 (2008).

“When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, . . . the sentences may run either concurrently or consecutively, as determined by the court.” N.C. Gen. Stat. § 15A-1354(a)

STATE v. TOLEDO

[204 N.C. App. 170 (2010)]

(2009). The trial court has the discretion to determine whether to impose concurrent or consecutive sentences. *See State v. Parker*, 350 N.C. 411, 441, 516 S.E.2d 106, 126 (1999) (citing N.C. Gen. Stat. § 15A-1354(a)), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000).

In the instant case, the trial court erroneously believed that it was mandated by law to impose consecutive sentences. When a trial judge acts under a misapprehension of the law, this constitutes an abuse of discretion. *Hines v. Wal-Mart Stores E., L.P.*, 191 N.C. App. 390, 393, 663 S.E.2d 337, 339 (2008) (citing *State v. Cornell*, 281 N.C. 20, 30, 187 S.E.2d 768, 774 (1972)), *disc. review denied*, 363 N.C. 126, 673 S.E.2d 131 (2009); *see also Riviere v. Riviere*, 134 N.C. App. 302, 307, 517 S.E.2d 673, 676 (1999). We vacate the judgments entered in the two trafficking cases and remand for a new sentencing hearing.

Upon remand, we note that the sentence for these offenses is 25-30 months, as mandated by N.C. Gen. Stat. § 90-95(h)(1)(a). Whether the two sentences should run concurrently or consecutively rests in the discretion of the trial court.

DISMISSED IN PART, NO ERROR IN PART, VACATED AND
REMANDED FOR NEW SENTENCING HEARING IN PART.

Judges BRYANT and BEASLEY concur.

STATE OF NORTH CAROLINA v. YOVANIS GONZALEZ TOLEDO

No. COA09-1063

(Filed 18 May 2010)

**Search and Seizure—probable cause—motion to suppress
improperly granted—exigent circumstances**

The trial court in a possession of marijuana case erred by finding and concluding that exigent circumstances did not exist to justify a search of a spare tire located underneath defendant's vehicle without a search warrant and suppressing the marijuana found therein. The search of the inside of defendant's vehicle was within the scope of defendant's consent and the discovery of marijuana inside a tire located in the vehicle was sufficient prob-

STATE v. TOLEDO

[204 N.C. App. 170 (2010)]

able cause to allow the officer to search every part of the vehicle, including the tire located underneath the vehicle.

Appeal by the State from order entered 7 May 2009 by Judge Henry W. Hight, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 10 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Ann B. Petersen for defendant-appellee.

BRYANT, Judge.

The State appeals from an order granting defendant's motion to suppress the contents of a spare tire taken from under defendant's vehicle without a search warrant. For the reasons stated herein, we reverse and remand.

Defendant Yovanis Toledo was indicted on charges of trafficking in marijuana by possession and trafficking in marijuana by transportation. Defendant filed a pretrial motion to suppress evidence obtained as a result of a warrantless search of defendant's vehicle, arguing that it was a violation of defendant's Fourth Amendment rights as stated in the United States Constitution. On 7 May 2009, at a hearing on defendant's motion, Sergeant Nathan Memmelaar testified to the events which led to the search of defendant's vehicle.

On 21 October 2008, Sergeant Memmelaar, an officer with fifteen years of law enforcement experience and five years with the Smithfield Police Department, was parked along Interstate 95 near the Brogden Road exit when he noticed a black Chevrolet Suburban with a Connecticut license plate. The vehicle moved behind a tractor trailer and came within a car length and a half of it. Sergeant Memmelaar activated his blue lights and stopped the vehicle for following too closely. Sergeant Memmelaar approached the vehicle, identified himself, and informed the driver why he had been stopped. The driver, defendant, accompanied the sergeant back to his police car where the sergeant checked to see if defendant's driver's license and vehicle registration were valid. Upon confirmation, defendant was informed that he would receive only a warning ticket. Still, while in the sergeant's vehicle, defendant seemed extremely nervous: "[h]e was continually rubbing his hands on his thighs" and avoided eye con-

STATE v. TOLEDO

[204 N.C. App. 170 (2010)]

tact. Upon completing the ticket, Sergeant Memmelaar asked if defendant would speak with him and then asked defendant if he had anything such as guns, drugs, or large amounts of currency, to which defendant replied he did not. Sergeant Memmelaar then asked if he could look in defendant's vehicle. Defendant said "Yeah," "[g]o ahead and look," and pointed toward the vehicle.

Inside the vehicle, Sergeant Memmelaar noticed a large tire in the luggage area. The tire was larger than the tires on the vehicle, and when asked to what vehicle the tire belonged, defendant said it belonged to his truck in Miami. Sergeant Memmelaar asked defendant why he would have a truck in Miami if he lived in Connecticut but did not receive a satisfactory answer. Sergeant Memmelaar removed the tire from the vehicle and conducted a "ping" test, pressing the tire valve to release some of the air. Immediately, Sergeant Memmelaar noted a "very strong odor of marijuana." Sergeant Memmelaar handcuffed defendant and placed him in his patrol vehicle, then continued to search the vehicle. In the undercarriage of defendant's vehicle was another spare tire. Sergeant Memmelaar removed the second spare and performed another ping test. Again, Sergeant Memmelaar noted a strong odor of marijuana. Sergeant Memmelaar then called his supervisor. Detective J.G. Whitley, a narcotics investigator, arrived at the scene and took possession of the tires. He pulled from the tires approximately thirty-five gallon sized freezer bags of marijuana weighing a total of 16.45 pounds.

After hearing the testimony, the trial court found and concluded that defendant's consent to search extended only to the interior of the vehicle; that the search of the tire located within the luggage area of defendant's vehicle was within the scope of consent; and that Sergeant Memmelaar had probable cause to seize the tire when the odor of marijuana was expelled. However, the trial court found and concluded that the search of the tire from the vehicle's undercarriage exceeded the scope of the consent to search. Therefore, the trial court denied defendant's motion to suppress evidence found in the tire located within the vehicle but granted the motion to suppress evidence taken from the second tire, located in the undercarriage. From this order, the State appeals.

On appeal, the State raises three questions; however, we address them as a single issue. Did the trial court err by making mixed findings of fact and conclusions of law that exigent circumstances did not

STATE v. TOLEDO

[204 N.C. App. 170 (2010)]

exist to justify a search of the second spare tire without a search warrant and suppressing the marijuana found therein.

Standard of Review

“Generally, an appellate court’s review of a trial court’s order on a motion to suppress is strictly limited to a determination of whether its findings are supported by competent evidence, and in turn, whether the findings support the trial court’s ultimate conclusion.” *State v. White*, 184 N.C. App. 519, 523, 646 S.E.2d 609, 611 (2007) (citation omitted). “Findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. However, the trial court’s conclusions of law are fully reviewable on appeal.” *State v. Robinson*, 189 N.C. App. 454, 458, 658 S.E.2d 501, 504 (2008) (internal citations and quotations omitted).

Analysis

The State argues that the trial court erred in finding and concluding that exigent circumstances did not exist to warrant the seizure of the second tire absent a warrant. We agree.

On appeal, defendant cites *Arizona v. Gant*, — U.S. —, 173 L. Ed. 2d 485 (2009), as providing the basis for the trial court’s suppression of the evidence seized from the second tire. There, the Supreme Court of the United States considered whether the Fourth Amendment allowed police to conduct a warrantless search of a vehicle after the defendant had been handcuffed and secured in a police vehicle for the offense of driving with a suspended license. The Court noted that as a basic rule “[s]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Id.* at —, 173 L. Ed. 2d at 493 (citation omitted). A search incident to a lawful arrest is such an exception. *Id.* However, the *Gant* Court determined that the rationale underlying a warrantless vehicle search incident to an arrest, i.e. officer safety and preservation of evidence, did not exist based on the facts of that case, where the suspect had been arrested on the charge of driving with a suspended license, had been handcuffed, and placed in an patrol car. *Id.* at —, 173 L. Ed. 2d at 497. However, the Court distinguished the facts of *Gant* from situations where “circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’” *Gant*, — U.S. —, 173 L. Ed. 2d at 496 (citing *Thornton*, 541 U.S. at

STATE v. TOLEDO

[204 N.C. App. 170 (2010)]

632, 158 L. Ed. 2d 905 (Scalia, J., concurring in judgment))¹. We believe *Gant* is instructive but otherwise inapplicable to the facts before us. “At bottom, the proper standard is intended to protect citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime, while at the same time giving fair leeway for enforcing the law in the community’s protection.” *United States v. Dickey-Bey*, 393 F.3d 449, 453-54 (4th Cir. 2004) (citation omitted). See also, *California v. Acevedo*, 500 U.S. 565, 570, 114 L. Ed. 2d 619, 628 (1991) (“The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause.”) (citation omitted).

In *United States v. Ross*, 456 U.S. 798, 72 L. Ed. 2d 572 (1982), a reliable confidential informant informed police that he observed a man selling drugs out of his trunk. *Id.* at 800, 72 L. Ed. 2d at 578. Officers immediately reported to the area and found the defendant and his vehicle, both of which matched the informant’s description. *Id.* at 801, 72 L. Ed. 2d at 578. The officers searched the interior of the vehicle and found a bullet in the passenger seat and a handgun in the glove compartment. *Id.* at 801, 72 L. Ed. 2d at 579. The defendant was then arrested. The officers continued to search the vehicle and in the trunk discovered a closed brown paper bag, which contained several glassine bags housing what was later determined to be heroin, and a closed pouch, which contained \$3,200.00. *Id.* The Court of Appeals for the District of Columbia Circuit held that the officers exceeded the scope of their authority by searching the packages found in the trunk without first obtaining a warrant. *Id.* at 802, 72 L. Ed. 2d at 579. Granting a writ of certiorari, the Supreme Court reversed, thereby determining that the officers’ search of the containers did not violate the defendant’s Fourth Amendment right against unreasonable searches and seizures. *Id.* at 800, 72 L. Ed. 2d at 578. In its reasoning, the Court stated that “the probable-cause [sic] determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and . . . facts within knowledge of the [officer], which in the judgment of the court would make his [good] faith reasonable.” *Id.* at 808, 72 L. Ed. 2d at 583. “The scope of a warrantless search . . . is defined by the object of the search and the places in which there is probable cause to believe that it may be

1. In *Thornton v. United States*, 541 U.S. 615, 158 L. Ed. 2d 905 (2004), the Supreme Court determined that a subsequent vehicle search did not violate the defendant’s Fourth Amendment rights when the defendant was confronted by police and arrested for possession of contraband while standing near his vehicle.

STATE v. TOLEDO

[204 N.C. App. 170 (2010)]

found.” *Id.* at 824, 72 L. Ed. 2d at 593. Based on its prior holding in *Carroll v. United States*, 267 U.S. 132, 69 L. Ed. 543 (1925) (setting forth automobile exception to the warrant requirement), the Supreme Court reversed the D.C. Circuit Court and held as follows:

[T]he scope of the warrantless search authorized by [the exception established in *Carroll*] is no broader and no narrower than a magistrate could legitimately authorize by warrant. *If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.*

Ross, 456 U.S. at 825, 72 L. Ed. 2d at 594 (emphasis added).

Here, Sergeant Memmelaar lawfully stopped defendant’s vehicle for following too closely and received defendant’s consent to search the vehicle. Consent to search a vehicle may be given by the person in apparent control of the vehicle and its contents. N.C. Gen. Stat. § 15A-222(2) (2009); *see also State v. Wilson*, 155 N.C. App. 89, 97, 574 S.E.2d 93, 99 (2002). Upon performing a ping test on a tire located inside the vehicle, Sergeant Memmelaar detected a strong odor of marijuana. As noted by the trial court, the search of the tire was within the scope of consent.² After marijuana was detected, defendant was immediately arrested for possession of marijuana. Thereafter, it was lawful for Sergeant Memmelaar to search the entire vehicle incident to defendant arrest for possession of marijuana.³ The discovery of marijuana in the first tire also provided probable cause to believe the vehicle was being used to transport marijuana, and, therefore, Sergeant Memmelaar had probable cause to search every part of the vehicle that may have concealed marijuana. *See Ross*, 456 U.S. 798, 72 L. Ed. 2d 572. We hold that the search of defendant’s vehicle and seizure of marijuana in the second tire, after detecting the smell of marijuana in the first tire, did not violate defendant’s Fourth Amendment right against unreasonable searches and seizures. Accordingly, we reverse the trial court’s order to

2. Unlike the trial court, we see nothing in the record that would limit the scope of defendant’s consent to search to the interior of the vehicle.

3. We note that the United States Supreme Court has reiterated its disfavor of allowing vehicle searches incident to any arrest unless that arrest involves genuine officer safety issues or evidentiary concerns, *see Arizona v. Gant*, — U.S. at —, 173 L. Ed. 2d at 499, and note that the holding in the instant case addresses a search of a vehicle incident to arrest where it is reasonable to believe the vehicle contains evidence of the crime of arrest.

STRICKLAND v. CITY OF RALEIGH

[204 N.C. App. 176 (2010)]

suppress the evidence discovered in the second tire and remand for further proceedings.

Reversed and remanded.

Judges STEELMAN and BEASLEY concur.

JO LINDA STRICKLAND, PLAINTIFF v. CITY OF RALEIGH, DEFENDANT(S)

No. COA09-962

(Filed 18 May 2010)

Cities and Towns— fall in crosswalk—one inch height difference from sidewalk—summary judgment for defendant

The trial court correctly granted summary judgment for defendant in a negligence action arising from plaintiff's fall in a crosswalk. Plaintiff causally linked her fall solely to a one-inch difference in the sidewalk and crosswalk, but her forecast of evidence, including falls by others, failed to establish that the defect was not trivial. Furthermore, the statute giving cities authority and control over sidewalks, N.C.G.S. § 160A-296, does not change the analysis of defendant's duty to maintain its sidewalks, nor does it appear that the building code provisions cited by plaintiff are applicable to the sidewalk in this case.

Appeal by plaintiff from order entered 24 April 2009 by Judge W. Osmond Smith, III in Superior Court, Wake County. Heard in the Court of Appeals 19 November 2009.

Mast, Schulz, Mast, Johnson, Wells & Trimyer, P.A. by George B. Mast and Ron L. Trimyer, Jr., for plaintiff-appellant.

City Attorney Thomas A. McCormick by Deputy City Attorney Hunt K. Choi, for defendant-appellee.

STROUD, Judge.

The trial court allowed summary judgment in favor of defendant, dismissing plaintiff's claim for personal injury arising from a fall. Plaintiff appealed from the summary judgment order. For the following reasons, we affirm.

STRICKLAND v. CITY OF RALEIGH

[204 N.C. App. 176 (2010)]

I. Background

On or about 25 January 2008, plaintiff filed a complaint against defendant alleging that

[o]n the afternoon of August 19, 2005, the Plaintiff was traveling on foot along Martin Street in the Fayetteville Street Mall area in Raleigh, Wake County, North Carolina. As the Plaintiff was walking between two crosswalks at Port City Java and First Citizens Bank on Martin Street, she stepped onto the edge of the crosswalk which was elevated at a height not readily noticeable to pedestrians and which was uneven with the rest of the crosswalk. This caused the Plaintiff's right ankle to roll, subsequently causing her to lose her balance and fall, striking her left knee on the pavement.

Plaintiff further alleged that as a result of the fall, she suffered severe and permanent injuries to her ankle, foot, and knee and incurred medical expenses and loss of income.

On 24 March 2008, defendant answered plaintiff's complaint by denying most of plaintiff's allegations and alleging as affirmative defenses contributory negligence and that defendant "is not liable in tort for injuries or damages arising from minor or trivial defects." On 9 March 2009, defendant filed a motion for summary judgment alleging numerous reasons why plaintiff's claim should fail.

On or about 16 April 2009, Carolyn Passley, a street vendor who had worked for several years near the location of plaintiff's fall, submitted an affidavit. Ms. Passley averred that the defect in the sidewalk was "dangerous to passersby due [to] its location in downtown Raleigh, the nature of the defect, and the number of prior incidents." Ms. Passley further averred that

[o]ver the past several months prior to Jo Linda Strickland's fall, I had observed numerous individuals fall or trip at the same place Jo Linda Strickland fell. I had been told by Mr. Simmons, (first name unknown) a maintenance employee with the City of Raleigh, prior to the fall, that the defect in the cross walk needed to be fixed due to the nature and hazard of the defect and the number of prior incidents at the same location. Mr. Simmons is now retired but was employed by the City of Raleigh as an employee to maintain the mall both before and at the time of Jo Linda Strickland's fall.

STRICKLAND v. CITY OF RALEIGH

[204 N.C. App. 176 (2010)]

Plaintiff also submitted an affidavit in opposition to defendant's summary judgment motion, averring that the sidewalk was defective due to "an approximate amount of [a] one inch difference in elevation[.]" Plaintiff also stated in her affidavit that "[t]he condition of the sidewalk was not noticeable by reason of the color of the pavement where the defect was located. The defect in this particular area of the side walk[sic] was hazardous and dangerous and was not merely an insignificant or trivial defect." Plaintiff further averred

[t]hat the North Carolina Accessibility Code (1999) Volume I-C, 3.3(b) provides "public walks shall have a continuous common surface that shall not be interrupted by steps or abrupt changes in level greater than one-fourth inch. If walks cross drive-ways or parking lots, then they shall blend to a common level by means of curb cuts, curb ramps or sloped areas whose gradient shall not exceed 1:12.

Furthermore, in response to a request for admissions from defendant, plaintiff admitted that she did not know how long the condition of the sidewalk had existed as it was on the day of her fall and that the difference in height between the two surfaces "was approximately one inch, and not more than two inches.

On 24 April 2009, the trial court allowed defendant's motion for summary judgment because the trial court concluded that a "one inch difference in the walking surface constituted a minor or trivial defect as a matter of law, and that the City of Raleigh's failure to correct such defect did not constitute a breach of its duty to keep its sidewalk in reasonably safe condition or proper repair." Plaintiff appeals.

II. Standard of Review

Summary judgment is proper when

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A trial court's grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party.

Fairway Outdoor Adver. v. Edwards, — N.C. App. —, —, 678 S.E.2d 765, 768-69 (2009) (citation omitted).

STRICKLAND v. CITY OF RALEIGH

[204 N.C. App. 176 (2010)]

III. Analysis

The trial court allowed summary judgment in favor of defendant because it concluded that the defect in the sidewalk upon which plaintiff fell was a “trivial defect[.]”

While the city is not an insurer of the safety of one who uses its streets and sidewalks, it is under a duty to use due care to keep its streets and sidewalks in a reasonably safe condition for the ordinary use thereof. A city will not be liable for injuries caused by trivial defects, which are not naturally dangerous. Municipalities do not insure that the condition of its streets and sidewalks are at all times absolutely safe.

Desmond v. City of Charlotte, 142 N.C. App. 590, 592, 544 S.E.2d 269, 271 (2001) (citations, quotation marks, and brackets omitted).

In *Desmond*, this Court conducted a thorough review of cases which have found trivial defects:

In *Joyce v. City of High Point*, 30 N.C. App. 346, 226 S.E.2d 856 (1976), the trial court properly entered summary judgment for the city when the irregularity in the sidewalk was 1-2 inches and the plaintiff did not see the irregularity before the fall. *Id.* at 350, 226 S.E.2d at 858. Our Supreme Court in *Bagwell v. Brevard*, 256 N.C. 465, 124 S.E.2d 129 (1962), held that plaintiff did not allege actionable negligence on the part of the town when the change in the sidewalk was approximately one inch. *Id.* at 466, 124 S.E.2d at 130. In *Watkins v. Raleigh*, 214 N.C. 644, 200 S.E. 424 (1939), our Supreme Court held that a hole in the sidewalk which was 2 1/2 feet wide and 2 or more inches in depth was trivial. *Id.* In *Falatovitch v. Clinton*, 259 N.C. 58, 129 S.E.2d 598 (1963), plaintiff fell in an opening of the sidewalk. *Id.* The defect had been there for at least three years. *Id.* at 59, 129 S.E.2d at 599. The defect was ten inches long, and several inches wide. *Id.* Our Supreme Court held that while the evidence tends to show there was a hole or crack in the cement sidewalk, the evidence, in our opinion, was insufficient to establish actionable negligence. Defendant’s failure to correct what must be considered a minor defect did not constitute a breach of its legal duty. *Id.* at 60, 129 S.E.2d at 599.

Desmond at 593, 544 S.E.2d at 271 (quotation marks and brackets omitted). In *Desmond* though the “plaintiff’s experts testified that the depression existed for a number of years and had been at least one-

STRICKLAND v. CITY OF RALEIGH

[204 N.C. App. 176 (2010)]

half of an inch for 1-2 years before the accident[, and t]his depression was contrary to the building code[.]” the plaintiff still did not “raise an inference of negligence.” *Id.*

Furthermore, in *Bagwell v. Brevard*, the plaintiff sued the Town of Brevard for negligence after she fell on a sidewalk. 256 N.C. 465, 465-66, 124 S.E.2d 129, 129 (1962). Both the plaintiff in *Bagwell* and plaintiff *sub judice* causally link their falls solely to an approximately one-inch difference in the sidewalk. *See id.* at 466, 124 S.E.2d at 129. In *Bagwell*, the North Carolina Supreme Court affirmed the trial court’s dismissal of plaintiff’s case because “the alleged defect or irregularity is a difference in elevation of approximately one inch between two adjacent concrete sections of the sidewalk. Defendant’s failure to correct this slight irregularity did not constitute a breach of its said legal duty.” *Id.* at 466, 124 S.E.2d at 130.

Plaintiff attempts to distinguish her case from the numerous cases regarding “trivial defects” by noting “[t]his particular defect obviously cannot be considered trivial as a matter of law, if numerous other persons have . . . fallen because of that same defect while walking over it.” However, plaintiff’s forecast of evidence, including that numerous others have fallen in the same location, fails to establish that the defect was not trivial. *See id.* Plaintiff does not direct our attention to any case law that establishes that if numerous individuals have fallen, the one-inch defect is not trivial. In fact, the cases noted in *Desmond* include defects that have been on the sidewalk for “at least three years” and are as large as “2 1/2 feet wide and 2 or more inches in depth[.]” *Id.* The simple fact that others have fallen where plaintiff did does not establish that the defect upon which plaintiff fell was not a trivial defect.

Plaintiff also argues that “[d]efendant failed to comply with the statutorily-provided duty of authority and control in maintaining its pedestrian passageways[.]” Plaintiff directs our attention to N.C. Gen. Stat. § 160A-296 which provides that

(a) A city shall have general authority and control over all public streets, sidewalks, alleys, bridges, and other ways of public passage within its corporate limits except to the extent that authority and control over certain streets and bridges is vested in the Board of Transportation. General authority and control includes but is not limited to:

- (1) The duty to keep the public streets, sidewalks, alleys, and bridges in proper repair;

STRICKLAND v. CITY OF RALEIGH

[204 N.C. App. 176 (2010)]

- (2) The duty to keep the public streets, sidewalks, alleys, and bridges open for travel and free from unnecessary obstructions[.]

N.C. Gen. Stat. § 160A-296(a)(1)-(2) (2005).

In *Desmond*, this Court discussed N.C. Gen. Stat. § 160A-296 and ultimately concluded that “[t]he law with regard to municipalities and maintenance of sidewalks is such that minor defects are not actionable.” 142 N.C. App. 590, 592-94, 544 S.E.2d 269, 272. Furthermore, plaintiff has not cited any cases that establish that N.C. Gen. Stat. § 160A-296 imposes a greater or different duty than that of the common law. Thus, N.C. Gen. Stat. § 160A-296 does not change our analysis of defendant’s duty to maintain its sidewalks.

Lastly, plaintiff contends that “the legislature has preempted the common law” by enacting the North Carolina State Building Code. Plaintiff cites the Building Code regarding its regulation of “public walks.” However, plaintiff’s cited provision falls within Part II of the Building Code. Part II is entitled “NEW CONSTRUCTION” and applies “If The Construction Was Commenced After January 26, 1992.” N.C. State Building Code, Vol. I-C, Part II (1999). Here, plaintiff has failed to allege when the sidewalk was constructed or last renovated. From our review of the Building Code and the record before us, it does not appear that the Building Code provisions cited by plaintiff are applicable to the sidewalk upon which plaintiff fell. Furthermore, plaintiff’s affidavit does not assert that this Building Code provision actually applies to the sidewalk on which she fell or that the Building Code would require defendant’s compliance as to this sidewalk. Plaintiff’s affidavit appears to treat the Building Code as a standard of care which may create an affirmative duty to correct even a trivial defect of less than one inch in a sidewalk, even if the Building Code is not strictly applicable to the sidewalk in question. However, as plaintiff has not demonstrated that the Building Code actually applies to the sidewalk on which she fell, we do not find that it changes the standard of care which has been established by North Carolina’s courts, as discussed above.

Lastly, plaintiff contends that “the rule of triviality itself is antiquated because safety standards evolve over time.” However, antiquity has never been a reason for this Court to overrule its own prior case law or that of the North Carolina Supreme Court; indeed, this Court does not have authority to do so. *Meza v. Division of Soc. Servs.*, 193 N.C. App. 350, 362, 668 S.E.2d 571, 578 (2008) (“It is for the

ANDRESEN v. PROGRESS ENERGY, INC.

[204 N.C. App. 182 (2010)]

Supreme Court and not the Court of Appeals to overrule decisions of our Supreme Court.” (citation omitted)); *In re T.M.H.*, 186 N.C. App. 451, 455, 652 S.E.2d 1, 3 (“This Court is bound by its prior decisions encompassing the same legal issue.” (citation omitted)), *disc. review denied*, 362 N.C. 87, 657 S.E.2d 31 (2007). Accordingly, this argument is meritless.

IV. Conclusion

For the foregoing reasons, we conclude that the trial court properly granted summary judgment in favor of defendant.

AFFIRMED.

Judges HUNTER, JR. and ERVIN concur.

KENNETH P. ANDRESEN AND MARGUERITTE C. ANDRESEN, PLAINTIFFS V.
PROGRESS ENERGY, INC., CAROLINA POWER & LIGHT COMPANY, AND
CAROLINA POWER & LIGHT COMPANY D/B/A PROGRESS ENERGY
CAROLINAS, INC., DEFENDANTS

No. COA09-1207

(Filed 18 May 2010)

1. Utilities— underground power line—no duty to inspect

The trial court correctly granted summary judgment for defendants in a negligence action arising from a damaged underground power line where plaintiffs did not establish a duty to periodically unearth and inspect the line.

2. Contracts— power company service contract—prima facie case of breach—evidence not sufficient

There was no genuine issue of fact as to the terms of a contract between plaintiff and defendant-power companies where plaintiff testified that he neither saw, agreed to, nor signed defendants’ service agreement. A reasonable mind would not accept this testimony as adequate to support the existence of contract terms as yet unidentified and summary judgment was properly granted.

ANDRESEN v. PROGRESS ENERGY, INC.

[204 N.C. App. 182 (2010)]

Appeal by plaintiffs from order entered 6 May 2009 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 25 February 2010.

Andresen & Arronte, PLLC, by Julian M. Arronte, for plaintiffs-appellants.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Scott Lewis and Ellen J. Persechini, for defendants-appellees.

JACKSON, Judge.

Kenneth P. Andresen (“Andresen”) and Margueritte C. Andresen (collectively, “plaintiffs”) appeal the 6 May 2009 order granting summary judgment to Progress Energy, Inc.; Carolina Power & Light Company; and Carolina Power & Light Company D/B/A Progress Energy Carolinas, Inc. (“defendants”). For the reasons stated herein, we affirm.

On 4 January 2008, plaintiffs arrived at their vacation home on Bald Head Island to find “something unusual” with their electrical system. When they flipped the light switches, the light bulbs were a dim amber color and then glowed intensely. According to Andresen, “the lights would get very bright on one portion of the house and then they were, at that same moment, rather dim where my wife was.” Plaintiffs placed a call to defendants, their electric service provider. One of defendants’ service crews arrived at plaintiffs’ house later that evening, and after fixing the problem with the underground neutral line, which apparently had been nicked, a crew member told plaintiffs to check all of their appliances because they “probably ha[d] all gotten fried.” When plaintiffs checked their appliances, they found problems with all of them. The majority, if not all, of plaintiffs’ appliances had been plugged directly into the wall outlets, and to plaintiff’s recollection, none of the appliances were equipped with internal surge protectors. Plaintiffs contacted defendants’ claims department.

On 18 January 2008, Andresen met at the vacation home with representatives from defendants; AT&T, plaintiffs’ telephone and Internet provider; and Telemedia, plaintiffs’ television provider. According to Andresen, defendants scheduled this meeting because defendants’ representative “thought that one of those entities [Telemedia or AT&T] damaged the line.” Defendants’ representatives unearthed the power, cable, and telephone lines and took photographs of them. Defendants denied plaintiffs’ claim, because their representative

ANDRESEN v. PROGRESS ENERGY, INC.

[204 N.C. App. 182 (2010)]

thought “that someone else is responsible for [the nicked line] and [defendants] are not.”

Plaintiffs filed suit against defendants on 2 April 2008, claiming both negligence and breach of contract. On 25 July 2008, plaintiffs filed an amended complaint. Plaintiffs voluntarily dismissed Progress Energy, Inc. as a defendant on 21 August 2008. Defendants filed their answer on 26 September 2008, denying, *inter alia*, both that they had been negligent and that they had breached their contract with plaintiffs. Defendants filed a motion for summary judgment, and following discovery and a 27 April 2009 hearing on the motion, the trial court granted summary judgment in favor of defendants on 6 May 2009. Plaintiffs appeal.

Plaintiffs’ first argument is that genuine issues of material fact exist as to whether defendants owed plaintiffs a duty to maintain their power line. We disagree.

[¶] We review a trial court’s grant of summary judgment *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004)). “Summary judgment is appropriate when ‘there is no genuine issue as to any material fact’ and ‘any party is entitled to a judgment as a matter of law.’” *Id.* (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005)). Our Supreme Court has held that “an issue is genuine if it is supported by substantial evidence, and [a]n issue is material if the facts alleged . . . would affect the result of the action[.]” *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (internal citations and quotation marks omitted). Furthermore, “[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference[.]” *Id.* (internal citations and quotation marks omitted).

The movant—defendants in the case *sub judice*—bears the burden of showing that “(1) an essential element of plaintiff’s claim is nonexistent; (2) plaintiff cannot produce evidence to support an essential element of its claim; or (3) plaintiff cannot surmount an affirmative defense raised in bar of its claim.” *Liller v. Quick Stop Food Mart, Inc.*, 131 N.C. App. 619, 621, 507 S.E.2d 602, 604 (1998) (citation omitted).

In order to sustain a claim for negligence, a plaintiff must prove (1) the defendant owed a duty to the plaintiff; (2) the defendant

ANDRESEN v. PROGRESS ENERGY, INC.

[204 N.C. App. 182 (2010)]

failed to exercise proper care in the performance of the duty; and (3) the breach of the duty was a proximate cause of the injury suffered by the plaintiff.

Sweat v. Brunswick Electric Membership Corp., 133 N.C. App. 63, 65, 514 S.E.2d 526, 528 (1999) (citing *Westbrook v. Cobb*, 105 N.C. App. 64, 67, 411 S.E.2d 651, 653 (1992)).

Our case law that addresses an electricity provider's duty to maintain its equipment focuses on above-ground lines—rather than those buried underground as here—and bodily injury to people—rather than the damage to property asserted here.

A supplier of electricity owes the highest degree of care to the public because of the dangerous nature of electricity. An electric company is required “to exercise reasonable care in the construction and maintenance of their lines when positioned where they are likely to come in contact with the public.” However, “the duty of providing insulation should be limited to those points or places where there is reason to apprehend that persons may come in contact with the wires. . . .” Also, this Court has held that an electrical utility has exercised reasonable care when it has insulated its power lines “by height and isolation in accordance with existing regulations.”

Id. (internal citations omitted).

According to the administrative rules and regulations that govern our State's utilities, “[e]ach utility shall maintain its plant, distribution system and facilities at all times in proper condition for use in rendering safe and adequate service.” 4 N.C. Admin. Code 11.R8-5(a) (2007). North Carolina utilities also “shall make a full and prompt investigation of all service complaints made to it by its consumers[.]” 4 N.C. Admin. Code 11.R8-6 (2007). Within its section specifically addressing underground utility lines, the National Electrical Safety Code from the American National Standards Institute¹ requires that “[a]ccessible lines and equipment . . . be inspected by the responsible party at such intervals as experience has shown to be necessary.” NESC § 31.313.A.2 (2002).

In the instant case, whether defendants owed plaintiffs a duty to maintain their underground power line is an element of a *prima facie* case of negligence and is, therefore, material because it would affect

1. The National Electrical Safety Code was adopted by Rule R8-26 of the North Carolina Utility Commission Rules and Regulations.

ANDRESEN v. PROGRESS ENERGY, INC.

[204 N.C. App. 182 (2010)]

the result of the action. However, plaintiffs' case must fail because they have failed to forecast any evidence that defendants in fact owed them a duty to unearth the underground power lines periodically and visually to inspect the lines to ascertain whether they had been nicked.

Plaintiffs argue that Chapter 8, Rule R8-23 of the North Carolina Utilities Commission Rules and Regulations requires electric utilities to "operate *and maintain* in safe, efficient and proper condition, all the facilities and instrumentalities used in connection with the regulation, measurement and delivery of electric current" 4 N.C. Admin. Code 11.R8-23 (2007) (emphasis added). However, defendants have complied with the specific requirements of the rules and regulations. They promptly investigated plaintiffs' complaint, arriving the same night that Andresen called in order to inspect and repair the nicked line. 4 N.C. Admin. Code 11.R8-6 (2007) ("Each utility shall make a full and prompt investigation of all service complaints made to it by its consumers[.]"). Plaintiffs presented no case law or statute that imposes a duty upon utility companies to inspect underground power lines. The applicable rules suggest that only *accessible* lines are subject to "inspect[ion] by the responsible party at such intervals as experience has shown to be necessary." NESC § 31.313.A.2 (2002). Plaintiffs have not suggested that they have an expert or any witness who will testify that such periodic inspection of underground lines is part of the reasonable care owed to customers by utility companies. Therefore, plaintiffs have failed to "produce evidence to support an essential element of [their] claim" because they have forecast no evidence that defendants owed them a duty to inspect underground power lines periodically in the absence of specific complaints. *Liller*, 131 N.C. App. at 621, 507 S.E.2d at 604 (citation omitted).

Because we hold that plaintiffs did not establish the element of duty within their *prima facie* case of negligence, plaintiffs cannot survive a motion for summary judgment based upon that claim. Therefore, we do not address their second argument that addresses one of defendants' defenses to the negligence claim—whether a genuine issue of material fact existed as to intervening negligence by a third party.

[2] Plaintiffs' final argument is that genuine issues of fact exist as to the terms of the contract between plaintiffs and defendants. We disagree.

ANDRESEN v. PROGRESS ENERGY, INC.

[204 N.C. App. 182 (2010)]

The requirements for summary judgment are set forth *supra*. “The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract.” *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citing *Jackson v. Carolina Hardwood Co.*, 120 N.C. App. 870, 871, 463 S.E.2d 571, 572 (1995)).

Here, defendants alleged that “[p]laintiffs’ claim of breach of contract against [defendant] fails as a matter of law based on the valid and enforceable Service Agreement, produced in discovery and used as the basis of the plaintiffs’ relationship with [defendant.]” The service agreement requires that the customer “install and maintain devices adequate to protect his equipment against irregularities on [defendants’] system, including devices to protect against single phasing[,]” which plaintiffs did not do. However, plaintiffs contend that Andresen’s testimony that he had neither seen, executed, nor agreed to the service agreement raises a genuine issue of material fact as to the terms of the contract between the parties. This controversy is material because the terms of the contract necessarily implicate whether or not the contract was breached—the second element of a breach of contract claim. However, plaintiffs’ claim still must fail, because although the unsigned service agreement presented by defendants is not dispositive, Andresen has not met his burden to present substantial evidence as to what the terms of the actual agreement between the parties were. A reasonable mind would not accept as adequate Andresen’s testimony—that he neither saw, agreed to, nor signed defendants’ service agreement—to support the existence of some as yet unidentified contractual terms that defendants allegedly breached. Without such forecast of evidence, plaintiffs have failed to present a *prima facie* case of breach of contract.

For these reasons, no genuine issues of material fact exist, and defendants were entitled to summary judgment as a matter of law. Therefore, we affirm the trial court’s grant of summary judgment to defendants.

Affirmed.

Judges ELMORE and STROUD concur.

SHIPPEN v. SHIPPEN

[204 N.C. App. 188 (2010)]

SHIRLEY RITCHIE SHIPPEN, PLAINTIFF v. JOHN LEE SHIPPEN, DEFENDANT

No. COA09-1181

(Filed 18 May 2010)

1. Contempt— civil—willfulness—child support—postseparation support

The trial court did not err in a child support and postseparation support case by holding defendant husband in civil contempt. The trial court concluded that defendant was able to work but voluntarily quit his job and refused to take another. Defendant did not quit his job and join a religious community which prohibited its members from earning outside income or owning assets until after entry of the support order.

2. Attorney fees— reasonableness—additional findings of fact required

The trial court erred by ordering defendant to pay additional attorney fees without making the findings of fact required by N.C.G.S. § 50-13.6 as to the reasonableness of the award.

Appeal by defendant from order entered 18 May 2009 by Judge H. Thomas Church in Alexander County District Court. Heard in the Court of Appeals 24 March 2010.

No brief for plaintiff-appellee.

Mary McCullers Reece for defendant-appellant.

BRYANT, Judge.

On 10 September 2008, plaintiff Shirley Ritchie Shippen filed a complaint against her husband, defendant John Lee Shippen, seeking custody, child support, post-separation support, alimony and equitable distribution. On 8 October 2008, the trial court ordered defendant to pay \$606.01 per month in child support and \$500.00 per month in post-separation support. The trial court also ordered defendant to pay plaintiff's attorney fees in the amount of \$500.00. On 11 February 2009, plaintiff moved for defendant to show cause for his failure to comply with the 8 October 2008 order ("the support order"). Defendant, *pro se*, filed a response and a motion to reconsider. Following a hearing, the trial court held defendant in civil contempt pending a purge in the amount of \$6,290.13 and payment of an addi-

SHIPPEN v. SHIPPEN

[204 N.C. App. 188 (2010)]

tional \$500.00 in attorney's fees to plaintiff's lawyer ("the contempt order"). Defendant appeals. As discussed below, we affirm the contempt order, but vacate the award of additional attorney fees and remand for additional findings.

Facts

Defendant and plaintiff married on 27 February 1982 and had two daughters who were teenagers at the time the parties separated. Defendant worked for the North Carolina Department of Correction and plaintiff worked as a substitute teacher and at Wal-mart. In August 2008, plaintiff moved out of the marital home and the parties separated. Shortly after entry of the support order, defendant joined the Twelve Tribes of Israel, a religious community which prohibits its members from earning outside income. Instead, the members farm and provide services to each other in exchange for food and a place to live. At the contempt hearing, defendant testified that he could not pay the court-ordered support because his membership in the religious community prevented him from earning outside income or owning assets.

On appeal, defendant makes two arguments: the trial court erred in (I) holding him in contempt where he did not have the ability to comply with the support order and his failure to comply was not willful; and (II) ordering him to pay additional attorney fees without making the findings of fact required by N.C. Gen. Stat. § 50-13.6. As discussed below, we affirm the order of contempt, but vacate the award of attorney fees and remand for additional findings.

I

[1] Defendant first argues that the trial court erred in holding him in contempt where he did not have the ability to comply and his failure to comply was not willful. We disagree.

"The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997). Among the unchallenged findings of fact in the contempt order are the following:

3. That at the time the [support] Order was entered, Defendant was employed full-time with the Alexander Correctional Institution, which income was the basis of said Order.

SHIPPEN v. SHIPPEN

[204 N.C. App. 188 (2010)]

4. That on or about October 30, 2008, the Defendant voluntarily quit his job so that he could dedicate his life to the Twelve Tribes of Israel, a religious organization in which the members live in a community environment and do not work outside said community, relying upon their own services to aid others to maintain themselves.

5. That, accordingly, it is the contention of the Defendant that he has no income “per se”, even though he admits he is physically and mentally able to be employed outside the community.

6. That the Defendant’s beliefs with regard to the twelve Tribes Organization appear to be sincerely held beliefs.

Defendant challenges finding of fact 11 which states that his non-compliance has been willful and that he “has the ability to comply or take reasonable efforts to do so.” He also challenges finding 12, which states that confinement is the least restrictive means to compel his compliance given that defendant has indicated he will not take outside employment under any circumstances.

The purpose of civil contempt is not to punish, but rather to coerce the defendant to comply with an order of the court. *Scott v. Scott*, 157 N.C. App. 382, 393, 579 S.E.2d 431, 438 (2003). To hold a defendant in civil contempt, the trial court must find the following: (1) the order remains in force, (2) the purpose of the order may still be served by compliance, (3) the non-compliance was willful, and (4) the non-complying party is able to comply with the order or is able to take reasonable measures to comply. N.C. Gen. Stat. § 5A-21 (2009). “In order to find that a defendant acted willfully, the court must find not only failure to comply but that the defendant presently possesses the means to comply.” *Miller v. Miller*, 153 N.C. App. 40, 50, 568 S.E.2d 914, 920 (2002) (internal citations and quotation marks omitted). “Wilfulness in matters of this kind involves more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law.” *Forte v. Forte*, 65 N.C. App. 615, 616, 309 S.E.2d 729, 730 (1983). Our State’s case law reveals

a well-established line of authority which holds that a failure to pay may be willful within the meaning of the contempt statutes where a supporting spouse is unable to pay because he or she voluntarily takes on additional financial obligations or divests him or herself of assets or income after entry of the support order. See, e.g., *Williford v. Williford*, 56 N.C. App. 610, 289 S.E.2d 907

SHIPPEN v. SHIPPEN

[204 N.C. App. 188 (2010)]

(1982) (supporting spouse took lower-paying job and applied salary to matters other than support obligations); *Frank v. Glanville*, 45 N.C. App. 313, 262 S.E.2d 677 (1980) (supporting spouse failed to take steps to obtain employment which would have enabled him to meet obligations); *Bennett v. Bennett*, 21 N.C. App. 390, 204 S.E.2d 554 (1974) (defendant spouse took lower paying job to avoid support obligations). A contrary rule would permit a supporting spouse to avoid his or her obligations by the simple means of expending assets as he or she pleased, and then pleading inability to pay support, thereby insulating him or herself from punishment by an order of contempt.

Faught v. Faught, 67 N.C. App. 37, 46, 312 S.E.2d 504, 509, *disc. review denied*, 311 N.C. 304, 317 S.E.2d 680 (1984).

Further, “[t]o justify conditioning defendant’s release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that defendant has the present ability to pay those arrearages.” *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985). We have held that, “[t]hough not specific, [a] finding regarding ‘present means to comply’ is minimally sufficient to satisfy the statutory requirement for civil contempt.” *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220, 222 (1986).

Finding 11 states:

11. That the Defendants [sic] failure to comply with the prior Court Order entered in October 2008 is willful and Defendant has the ability to comply or take reasonable efforts to do so.

Defendant first argues that the trial court made no finding that he had the present ability to pay the arrearage and purge himself of contempt. As in *Adkins*, this finding, while not as specific or detailed as might be preferred, is minimally sufficient. Further, unchallenged findings 3, 4, and 5 state that defendant is able to work but voluntarily quit his job and has refused to take another. These findings and defendant’s own testimony fully support the second portion of finding 11.

Defendant next contends his non-compliance was not willful because he was acting in good faith based on his sincerely-held religious beliefs. As discussed above, “a failure to pay may be willful within the meaning of the contempt statutes where a supporting spouse is unable to pay because he or she voluntarily takes on additional financial obligations or divests him or herself of assets or

SHIPPEN v. SHIPPEN

[204 N.C. App. 188 (2010)]

income after entry of the support order.” *Faught*, 67 N.C. App. at 46, 312 S.E.2d at 509. Here, defendant did not quit his job and join a religious community until after entry of the support order. That defendant’s religious beliefs may be sincerely-held, as the trial court found, is irrelevant. Our courts have held that child support and alimony obligations cannot be avoided where the obligor has voluntarily assumed additional obligations, such as through remarriage or the birth of additional children. *Williford*, 56 N.C. App. at 612, 289 S.E.2d at 909. Presumably the defendant in *Williford* held a sincere desire to remarry and become a parent again; however, his sincere desire did not excuse him of his duty to comply with valid court orders or make his refusal to do so anything other than willful. Finding 11 is fully supported by the evidence. Defendant’s arguments are overruled. Defendant fails to make argument regarding finding 12 in his brief and we deem his assignment of error on that issue abandoned.

II

[2] Defendant next argues the trial court erred in ordering him to pay attorney fees without making required findings of fact. We agree.

“North Carolina courts have held that the contempt power of the trial court includes the authority to require the payment of reasonable attorney’s fees to opposing counsel as a condition to being purged of contempt for failure to comply with a child support order.” *Eakes v. Eakes*, 194 N.C. App. 303, 312, 669 S.E.2d 891, 897 (2008). “Where an award of attorney’s fees is granted, the trial court must make adequate findings as to the reasonableness of the award.” *Id.*

Before awarding attorney’s fees, the trial court must make specific findings of fact concerning:

- (1) the ability of the intervenors to defray the cost of the suit, i.e., that the intervenors are unable to employ adequate counsel in order to proceed as a litigant to meet the other litigants in the suit;
- (2) the good faith of the intervenors in proceeding in this suit;
- (3) the lawyer’s skill;
- (4) the lawyer’s hourly rate;
- (5) the nature and scope of the legal services rendered.

In re Baby Boy Scarce, 81 N.C. App. 662, 663-64, 345 S.E.2d 411, 413 (citations omitted), *cert. denied*, 318 N.C. 415, 349 S.E.2d 590

STATE v. BROOKS

[204 N.C. App. 193 (2010)]

(1986). Here, the contempt order fails to contain the required findings. We vacate the award of attorneys' fees and remand for additional findings.

Affirmed in part; vacated in part and remanded.

Judges STEELMAN and BEASLEY concur.

STATE OF NORTH CAROLINA v. MICHAEL BROOKS

No. COA09-1068

(Filed 18 May 2010)

Sexual Offenders— satellite-based monitoring—sexual battery not an aggravated offense

The Court of Appeals exercised its discretion under N.C. R. App. P. 2 and determined that the trial court erred in an assault by strangulation and sexual battery case by requiring defendant to enroll in lifetime satellite-based monitoring. Sexual battery is not an “aggravated offense” for the purposes of N.C.G.S. § 14-208.40B.

Appeal by Defendant from order entered 24 April 2009 by Judge R. Allen Baddour in Superior Court, Orange County. Heard in the Court of Appeals 10 February 2010.

Attorney General Roy Cooper, by Assistant Attorney General Thomas H. Moore, for the State.

Robert W. Ewing for Defendant-Appellant.

McGEE, Judge.

Michael Brooks (Defendant) was indicted for second-degree rape, second-degree sexual offense, and assault by strangulation. He was also charged with sexual battery in a subsequently filed information. Defendant entered a guilty plea to assault by strangulation and sexual battery on 5 January 2009. The trial court found as an aggravating factor that Defendant was on probation when the crimes were committed and sentenced Defendant to consecutive terms of 25 to 30 months and 150 days in prison.

STATE v. BROOKS

[204 N.C. App. 193 (2010)]

Pursuant to N.C. Gen. Stat. § 14-208.40B, the trial court conducted a hearing to determine Defendant's eligibility for enrollment in a satellite-based monitoring program (SBM) on 24 April 2009. The trial court made the following pertinent findings: (1) Defendant was convicted of a reportable offense under N.C. Gen. Stat. 14-208.6, in that his conviction was for a sexually violent offense under N.C. Gen. Stat. § 14-208.6(5); (2) Defendant was not classified as a sexually violent predator; (3) Defendant was not a recidivist; (4) Defendant's conviction was an aggravated offense; and (5) Defendant's conviction did not involve the physical, mental, or sexual abuse of a minor. Upon release from imprisonment, the trial court ordered Defendant to (1) register as a sex offender and (2) to enroll in an SBM program, both for the remainder of his natural life. Defendant appeals from the trial court's order requiring him to enroll in an SBM program for the remainder of his natural life.

Grounds for Appellate Review

Defendant gave oral notice of appeal at the SBM hearing from the trial court's order requiring him to enroll in an SBM program for the remainder of his natural life. While oral notice of appeal is proper in "criminal action[s,]" as permitted under N.C.R. App. P. 4(a)(1), oral notice of appeal is insufficient to confer jurisdiction on this Court in civil proceedings. N.C.R. App. P. 3(a); *Melvin v. St. Louis*, 132 N.C. App. 42, 43, 510 S.E.2d 177, 177 (1999). We note that Defendant is appealing only from the trial court's order requiring him to enroll in SBM for life, and not from his underlying conviction. Because this is a jurisdictional issue, we must first determine whether Defendant's oral notice of appeal was sufficient in this case.

Our Court has held that SBM hearings and proceedings are not criminal actions, but are instead a "civil regulatory scheme[.]" *State v. Bare*, — N.C. App. —, —, 677 S.E.2d 518, 527 (2009). In *State v. Singleton*, — N.C. App. —, 689 S.E.2d 562 (2010), our Court further determined that: "Therefore, for purposes of appeal, a SBM hearing is not a 'criminal trial or proceeding' for which a right of appeal is based upon N.C. Gen. Stat. § 15A-1442 or N.C. Gen. Stat. § 15A-1444." *Singleton*, — N.C. App. at —, 689 S.E.2d at 565. We note that in *Singleton*, our Court determined that we have "jurisdiction to consider appeals from SBM monitoring determinations under N.C. Gen. Stat. § 14-208.40B pursuant to N.C. Gen. Stat. § 7A-27." *Id.* at —, 689 S.E.2d at 566. In light of our decisions interpreting an SBM hearing as not being a criminal trial or proceeding for purposes of appeal, we must hold that oral notice pursuant to N.C.R. App. P. 4(a)(1) is insuff-

STATE v. BROOKS

[204 N.C. App. 193 (2010)]

ficient to confer jurisdiction on this Court. Instead, a defendant must give notice of appeal pursuant to N.C.R. App. P. 3(a) as is proper “in a civil action or special proceeding[.]” N.C.R. App. P. 3(a).

N.C.R. App. P. 3(a) requires that a party “fil[e] notice of appeal with the clerk of superior court and serv[e] copies thereof upon all other parties[.]” *Id.* Because the record on appeal does not contain a written notice of appeal filed with the clerk of superior court, which was served upon the State, this appeal must be dismissed. *Melvin*, 132 N.C. App. at 43, 510 S.E.2d at 177; *see also Putman v. Alexander*, — N.C. App. —, —, 670 S.E.2d 610, 614 (2009). However, in his brief, Defendant requests that, should we find his notice of appeal insufficient, we treat his brief as a petition for writ of certiorari. In the interest of justice, and to expedite the decision in the public interest, we elect to grant Defendant’s request to consider his brief as a petition for writ of certiorari. *Putman*, — N.C. App. at —, 670 S.E.2d at 614. We allow Defendant’s petition for writ of certiorari and address the merits of his appeal.

Grounds for Enrollment in SBM

Defendant contends there was no basis for subjecting him to lifetime SBM. However, Defendant did not argue this issue in his brief. Ordinarily, an issue not argued in a brief is deemed abandoned. N.C.R. App. P. 28(a) (2009) (“Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party’s brief, are deemed abandoned.”); N.C.R. App. P. 28(b)(6) (2009) (“Assignments of error not set out in the appellant’s brief, or in support of which no reason or argument is stated . . . will be taken as abandoned.”)¹. The State argues that our Court should, “in the interest of justice,” consider the issue of Defendant’s eligibility for SBM. Likewise, in his reply brief, Defendant requests that we utilize our authority under N.C.R. App. P. 2 to consider this issue. We choose to exercise our discretion pursuant to Rule 2 in order to consider this issue. *See State v. Hill*, 179 N.C. App. 1, 632 S.E.2d 777 (2006). All other issues or questions not argued by Defendant in his brief are deemed abandoned. *See Appeal of Parker*, 76 N.C. App. 447, 450, 333 S.E.2d 749, 751 (1985).

N.C. Gen. Stat. § 14-208.40B (2009) sets forth the procedure for determination of SBM eligibility. N.C. Gen. Stat. § 14-208.40B(b) pro-

1. We note that Defendant’s appeal was filed on 17 August 2009, prior to the amendments to the Rules of Appellate Procedure, which took effect 1 October 2009. We therefore apply the version of the Rules effective prior to 1 October 2009.

STATE v. BROOKS

[204 N.C. App. 193 (2010)]

vides that a trial court shall conduct a hearing to make certain factual determinations. N.C. Gen. Stat. § 14-208.40B(b) (2009).

If the court finds that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, or (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, the court shall order the offender to enroll in satellite-based monitoring for life.

N.C. Gen. Stat. § 14-208.40B(c) (2009). A sexually violent predator is

a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses directed at strangers or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.

N.C. Gen. Stat. § 14-208.6(6) (2009). N.C. Gen. Stat. § 14-208.6(5) contains a list of enumerated offenses which qualify as “[s]exually violent offense[s].” N.C. Gen. Stat. § 14-208.6(5) (2009).

Likewise, “aggravated offense” is defined in N.C. Gen. Stat. § 14-208.6(1a) as

any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

N.C. Gen. Stat. § 14-206.6(1a) (2009).

In the case before us, the trial court found that “Defendant ha[d] not been classified as a sexually violent predator[,]” and was not a recidivist. Further, Defendant was not “convicted of G.S. 14-27.2A or G.S. 14-27.4A[,]” as required by N.C.G.S. § 14-208.40B(c). Thus, the only finding which supported the trial court’s order requiring Defendant to enroll in SBM for life was its finding that “this conviction is an aggravated offense.”

Our Court recently held that, in determining whether an offense was an aggravated offense for the purposes of N.C.G.S. § 14-208.40A, a trial court looks only to the elements of the offense and not to the

STATE v. BROOKS

[204 N.C. App. 193 (2010)]

underlying facts giving rise to the conviction. *State v. Davison*, — N.C. App. —, —, 689 S.E.2d 510, 517 (2009). In *Singleton*, this interpretation was extended to hearings conducted pursuant to N.C.G.S. § 14-208.40B, such as the one in the case before us. *Singleton*, — N.C. App. at —, 689 S.E.2d at 567. Defendant in the present case was convicted of sexual battery, as defined in N.C. Gen. Stat. § 14-27.5A:

A person is guilty of sexual battery if the person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person:

- (1) By force and against the will of the other person; or
- (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

N.C. Gen. Stat. § 14-27.5A(a) (2009). Comparing the elements of sexual battery with the definition of “aggravated offense” set forth in N.C.G.S. § 14-208.6(1a), we find significant differences between the two.

An aggravated offense requires, in pertinent part, “engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence[.]” N.C.G.S. § 14-208.6(1a). As described above, a conviction for sexual battery does not require that a defendant engage in “vaginal, anal, or oral penetration” with the victim. Rather, sexual battery contemplates any “sexual contact” with a victim carried out by force, and against the will of the victim, or against a person who is “mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.” N.C.G.S. § 14-27.5A(a). Thus, because sexual battery does not involve “vaginal, anal, or oral penetration[.]” sexual battery is not an “aggravated offense” for the purposes of N.C.G.S. § 14-208.40B.

Because the trial court’s sole basis for ordering Defendant to enroll in lifetime SBM was its erroneous finding that Defendant was convicted of an aggravated offense, we must reverse the trial court’s order.

The State requests that we remand this case to the trial court for its determination of whether “Defendant should be deemed a sexually

STATE v. KING

[204 N.C. App. 198 (2010)]

violent offender and subjected to SBM on that basis.” However, the State presents no argument that the trial court’s determination that Defendant was not a sexually violent offender was error, and we are not convinced that this finding need be addressed on remand. We note that in *Davison*, our Court remanded to the trial court with instructions to follow the procedure set forth in N.C.G.S. § 14-208.40A. *Davison*, — N.C. App. at —, 689 S.E.2d at 517. However, in the matter before us, the trial court’s error was not in failing to follow the procedure in N.C.G.S. § 14-208.40B. Instead, the trial court erred in concluding that sexual battery was an aggravated offense. Because the trial court’s order was based on an erroneous conclusion and there was no further procedural error, we need only reverse the trial court’s order. In light of our decision, we need not address Defendant’s remaining assignments of error.

Reversed.

Judges STEELMAN and BEASLEY concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER D. KING, DEFENDANT

No. COA09-952

(Filed 18 May 2010)

Sexual Offenders— satellite-based monitoring—indecent liberties conviction—parole violations

The trial court erred by ordering satellite-based monitoring upon a conviction for an aggravated offense where defendant was convicted of indecent liberties. On remand, the trial court can consider the number and frequency of defendant’s probation violations as well as the nature of the conditions violated in making its determination.

Appeal by defendant from order entered on or about 18 February 2009 by Judge Ola M. Lewis in Superior Court, Brunswick County. Heard in the Court of Appeals 10 December 2009.

STATE v. KING

[204 N.C. App. 198 (2010)]

Attorney General Roy A. Cooper, III by Assistant Attorney General Catherine M. (Katie) Kayser, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

STROUD, Judge.

Defendant was ordered to enroll in satellite-based monitoring. Though the trial court erred in concluding that defendant had committed an aggravated offense and must enroll in satellite-based monitoring for life, we conclude there was sufficient evidence upon which to remand the case for the trial court to determine if defendant requires the highest possible level of supervision and monitoring. Therefore, we reverse and remand.

I. Background

On or about 6 September 2005, defendant was indicted for indecent liberties with a child. On or about 1 October 2007, defendant pled guilty to the charge and was placed on supervised probation for 36 months. As a condition of probation, defendant was also required to serve an active term of four months imprisonment, but he was credited for the time he served while awaiting trial. On or about 18 March 2008, defendant's probation was revoked, and he was sentenced to 13 to 16 months imprisonment. On or about 18 February 2009, defendant was ordered to enroll in satellite-based monitoring ("SBM") for "the remainder of . . . [his] natural life" because he "was convicted of an aggravated offense." Defendant appeals.

II. Satellite-Based Monitoring

Defendant argues there was insufficient evidence to show that his indecent liberties conviction was an aggravated offense. The State concedes this point. We also agree.

N.C. Gen. Stat. § 14-208.40B sets forth the conditions under which an offender may be required to enroll in SBM at a "bring back" hearing, such as defendant's hearing. *See State v. Morrow*, — N.C. App. —, —, 683 S.E.2d 754, 757, *disc. review denied*, 363 N.C. 747, — S.E.2d — (2009). N.C. Gen. Stat. § 14-208.40B(c) requires that a defendant who is convicted of an aggravated offense be ordered to enroll in SBM for life. *See* N.C. Gen. Stat. § 14-208.40B(c) (2009). An aggravated offense is defined as "any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sex-

STATE v. KING

[204 N.C. App. 198 (2010)]

ual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.” N.C. Gen. Stat. § 14-208.6(1a) (2009).

This Court has previously determined that indecent liberties with a minor is not an aggravated offense as defined by N.C. Gen. Stat. § 14-208.6(1a). *See State v. Singleton*, — N.C. App. —, —, 689 S.E.2d 562, 568-69 (2010). In *Singleton*, this Court concluded that

[t]he trial court’s finding that defendant was convicted of indecent liberties with a child was supported by competent record evidence, as this was his conviction offense. The trial court’s conclusion that defendant had been convicted of an aggravated offense was legally incorrect, as the offense of indecent liberties with a child does not fit within the definition of an aggravated offense pursuant to N.C. Gen. Stat. § 14-208.6(1a). In addition, the trial court’s conclusion of law that defendant must be enrolled in SBM for the remainder of his natural life was also in error, as this conclusion did not reflect a correct application of law to the facts found.

Singleton at —, 689 S.E.2d 562, 568-69 (citations and quotation marks omitted). Therefore, the trial court erred by ordering SBM based upon a conviction of an aggravated offense under N.C. Gen. Stat. § 14-208.6(1a). *See id.*

At defendant’s SBM hearing, the State requested defendant be placed on SBM because he had committed an aggravated offense and because defendant required the highest possible level of supervision pursuant to N.C. Gen. Stat. § 14-208B(c). Thus, the trial court could have ordered SBM pursuant to N.C. Gen. Stat. § 14-208.40B(c) which provides that

[i]f the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that the offense is not an aggravated offense or a violation of G.S. 14-27.2A or G.S. 14-27.4A, and the offender is not a recidivist, the court shall order that the Department do a risk assessment of the offender. The Department shall have a minimum of 30 days, but not more than 60 days, to complete the risk assessment of the offender and report the results to the court. The Department may use a risk assessment of the offender done within six months of the date of the hearing.

Upon receipt of a risk assessment from the Department, the court shall determine whether, based on the Department’s risk

STATE v. KING

[204 N.C. App. 198 (2010)]

assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court.

N.C. Gen. Stat. § 14-208.40B(c).

In *Morrow*, the SBM hearing immediately followed the defendant's probation revocation hearing, at which the defendant "admitted that he inexcusably failed to attend at least seven sessions of a sexual abuse treatment program[.]" *Morrow* at —, 683 S.E.2d at 761. This Court determined that

our review requires us to consider whether evidence was presented which could support findings of fact leading to a conclusion that the defendant requires the highest possible level of supervision and monitoring. If the State presented no evidence which would tend to support a determination of a higher level of risk than the moderate rating assigned by the DOC, then the order requiring defendant to enroll in SBM should be reversed. However, if evidence supporting the trial court's determination of a higher level of risk is presented, it is proper to remand this case to the trial court to consider the evidence and make additional findings.

This case is distinguishable from our recent decision in *Kilby* where we reversed the SBM enrollment order when the State presented no evidence which tended to support a determination of a higher level of risk than the moderate rating assigned by the DOC. In fact, all of the evidence in *Kilby* presented alongside the DOC's risk assessment indicated that the defendant was fully cooperating with his post release supervision, which might support a finding of a lower risk level, but not a higher one. Accordingly, *Kilby* reasoned that the findings of fact were insufficient to support the trial court's conclusion that defendant requires the highest possible level of supervision and monitoring based upon a moderate risk assessment from the DOC and reversed.

In contrast, in the case *sub judice*, in the probation revocation hearing which immediately preceded the SBM hearing, defendant admitted that he inexcusably failed to attend at least

STATE v. KING

[204 N.C. App. 198 (2010)]

seven sessions of a sexual abuse treatment program required as a condition of his probation. This is evidence which could support a finding of higher risk. While we appreciate the difference between the probation revocation hearing and the SBM hearing, we cannot ignore the fact that less than two hours before ordering defendant to enroll in SBM the trial court had relevant and persuasive evidence before it as to defendant's risk to the public; this evidence is also a part of the record before this court. Accordingly, we remand to the trial court for additional evidentiary proceedings and more thorough findings of fact as to the level of defendant's risk.

Id. at —, 683 S.E.2d at 761-62 (2009) (citations, quotation marks, ellipses, and brackets omitted).

Here, just as in *Morrow*, the DOC's risk assessment of defendant indicated that he was a moderate risk. *See id.* at —, 683 S.E.2d at 757. However, there was also evidence from the judgment revoking defendant's probation that he had violated six conditions of probation. Defendant's six violations included failure to be at home for two home visits, failure to pay any of his monetary obligation, failure to obtain approval before moving, failure to report his new address and update the sex offender registry accordingly, failure to enroll in and attend sex offender treatment, and failure to inform his supervising officer of his whereabouts, leading to the conclusion that he had absconded supervision.

Although the probation revocation hearing and the SBM hearing were held on the same day and before the same judge in *Morrow*, *id.* at —, 683 S.E.2d at 761-62, and in the case before us they were held at different times, the effect of the determinations regarding the defendant's cooperation, or lack thereof, with conditions of probation is the same. Here the trial court had the benefit of the judgment revoking defendant's probation, which included specific findings as to the conditions of probation which defendant violated. As the trial court had already determined that defendant committed these violations of probation, the evidence could support a finding that "defendant requires the highest possible level of supervision and monitoring[.]" or SBM. The trial court can consider the number and frequency of defendant's probation violations as well as the nature of the conditions violated in making its determination. In particular, defendant's violations of failing to report his residence address and to update the sex offender registry as well as his failure to enroll in and attend sex offender treatment could support a finding that defendant poses a

STATE v. YOW

[204 N.C. App. 203 (2010)]

higher level of risk and is thus in need of SBM. We also noted in *Morrow* that the defendant's failure to enroll in and attend sex offender treatment is "evidence which could support a finding of higher risk." *Id.* at —, 683 S.E.2d at 761. Thus, as in *Morrow*,

[w]e remand the trial court order requiring defendant to enroll in SBM for further findings of fact regarding whether defendant requires the highest possible level of supervision and monitoring, and if so, for the trial court to determine a definite time period for which defendant should be required to enroll in SBM.

Id. at —, 683 S.E.2d at 762 (quotation marks and brackets omitted).

III. Conclusion

We conclude that the trial court erred in ordering defendant to enroll in SBM for life as the trial court erroneously determined that defendant had committed an aggravated offense; however, we remand for additional findings of fact as to whether defendant requires the highest possible level of supervision and monitoring, and if so, for the trial court to specify a definite time period for SBM enrollment.

REVERSED and REMANDED.

Judges HUNTER, JR. and ERVIN concur.

STATE OF NORTH CAROLINA v. RICKY ODELL YOW, DEFENDANT

No. COA09-967

(Filed 18 May 2010)

Sexual Offenders— satellite-based monitoring—recidivist

The trial court did not err by requiring defendant to enroll in satellite-based monitoring (SBM) for 10 years based on the fact that he was a recidivist. Defendant failed to present any new factual information to support his arguments that SBM is punitive in effect, and his constitutional arguments have previously been rejected. The Court of Appeals noted that the State should have cross-appealed the term of 10 years because N.C.G.S. § 14-208.40B(c) requires life enrollment for a recidivist.

STATE v. YOW

[204 N.C. App. 203 (2010)]

Appeal by defendant from order entered on or about 19 February 2009 by Judge Robert H. Hobgood in Superior Court, Alamance County. Heard in the Court of Appeals 10 December 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Oliver G. Wheeler, IV, for the State.

Greene & Wilson, P.A., by Thomas Reston Wilson, for defendant-appellant.

STROUD, Judge.

Defendant appeals order requiring him to enroll in satellite-based monitoring (“SBM”) for 10 years. As defendant has brought forth no new evidence regarding SBM, we are controlled by precedential case law and affirm.

I. Background

On or about 25 August 2008, defendant was indicted for third degree sexual exploitation of a minor. Defendant was determined to have a prior record level of III. On or about 24 September 2008, defendant pled guilty and was sentenced to 6 to 8 months imprisonment. Defendant’s sentence was suspended, and he received 36 months of supervised probation. Defendant was also required to register as a sex offender. On or about 19 February 2009, defendant was ordered to enroll in satellite-based monitoring (“SBM”) for 10 years because he “is a recidivist.” Defendant appeals.

II. Analysis

Defendant argues the trial court erred in ordering him to enroll in SBM because it violates prohibitions against ex post facto laws, double jeopardy, and his right to a trial by jury. Though defendant does state facts in his brief to support his argument that SBM should be considered as punitive in effect, defendant failed to present this information before the trial court and thus this information is not in the record on appeal. In fact, defendant testified during the SBM hearing, but he failed to mention any of the circumstances discussed in his brief which he claims make his situation unique. Because defendant included factual information in his brief which is not in the record, the State filed a “motion to strike material outside the record from defendant-appellant’s brief[,]” (original in all caps), which we allow. *See Hudson v. Game World, Inc.*, 126 N.C. App. 139, 142, 484 S.E.2d 435, 437-38 (1997) (“Rule 9 of the Rules of

STATE v. YOW

[204 N.C. App. 203 (2010)]

Appellate Procedure limits our review to the record on appeal. Matters discussed in the brief but outside the record will not be considered.” (citation omitted)).

We are thus left with the same constitutional arguments we have previously addressed and must therefore affirm the trial court’s order as these arguments have all been rejected. *See State v. Hagerman*, — N.C. App. —, —, 685 S.E.2d 153, 155 (2009) (“[T]he imposition of SBM, as a civil remedy, could not increase the maximum penalty for defendant’s crime. The State did not need to present any facts in an indictment or prove any facts beyond a reasonable doubt to a jury in order to subject defendant to SBM.”); *State v. Wagoner*, — N.C. App. —, —, 683 S.E.2d 391, 400 (2009) (“As we have already held that SBM is a civil regulatory scheme, and not a punishment, double jeopardy does not apply.” (citation omitted)); *State v. Bare*, — N.C. App. —, —, 677 S.E.2d 518, 531 (2009) (“Defendant has failed to show that the effects of SBM are sufficiently punitive to transform the civil remedy into criminal punishment. Based on the record before us, retroactive application of the SBM provisions do not violate the ex post facto clause.”)

Lastly, we note that though defendant was ordered to enroll in SBM because he is a recidivist, the trial court ordered defendant to enroll in SBM for only 10 years. However, N.C. Gen. Stat. § 14-208.40B(c) requires the trial court to enroll defendant in SBM for life if he is determined to be a recidivist. *See* N.C. Gen. Stat. § 14-208.40B(c) (2009). The trial court is to set a term for SBM only for SBM ordered under N.C. Gen. Stat. § 14-208.40B(c), based upon “an offense that involved the physical, mental, or sexual abuse of a minor[.]” *Id.* On the SBM order, AOC-CR-816, Rev. 12/08, the trial court checked the box finding that “the defendant is a recidivist. (use Order No.1.a. below.)” The provisions of “Order No.1.a.” require defendant to enroll in SBM for life; this form provision is in accordance with N.C. Gen. Stat. § 14-208.40B(c). *See id.* However, the trial court did not check “Order No.1.a.[.]” but instead checked Order No.1.b and wrote in a term of “10 years [.]” We realize that in the process of checking boxes on form orders, it is possible for the wrong box to be marked inadvertently, creating a clerical error which can be corrected upon remand. *See State v. Lark*, — N.C. App. —, —, 678 S.E.2d 693, 702 (2009) (“When, on appeal, a clerical error is discovered in the trial court’s judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth. A clerical error is an error resulting

STATE v. BOWLIN

[204 N.C. App. 206 (2010)]

from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination.” (citations, quotation marks, and brackets omitted)), *disc. review denied*, 363 N.C. 808, — S.E.2d (2010). However, we do not consider the trial court’s mistake to be a clerical error of checking the wrong box because the trial court handwrote “10 years” as the time defendant was to enroll in SBM. In addition, the trial court orally stated during defendant’s SBM hearing that “the defendant is a recidivist” and must enroll in SBM “for a period of ten years.” “[T]he proper procedure for presenting alleged errors that purport to show that the judgment was erroneously entered and that an altogether different kind of judgment should have been entered is a cross-appeal.” *Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 684 (2002) (citations omitted). As the State has not cross-appealed as to the term of 10 years of SBM, we cannot address this issue, but we do note this error on the order and admonish both the State and trial court to apply the plain language of the statute regarding such important determinations.

III. Conclusion

As defendant has failed to present any new factual information which would support his arguments that SBM is punitive in effect and his legal arguments have previously been rejected by this court, we affirm.

AFFIRMED.

Judges HUNTER, JR. and ERVIN concur.

STATE OF NORTH CAROLINA v. TIFFANY MICHELLE BOWLIN

No. COA09-1379

(Filed 18 May 2010)

Sexual Offenders— satellite-based monitoring—does not violate prohibition against ex post facto laws

The trial court did not err by ordering defendant to enroll in lifetime satellite-based monitoring for her convictions of indecent liberties with a child. Even though the crimes were commit-

STATE v. BOWLIN

[204 N.C. App. 206 (2010)]

ted before the effective date of N.C.G.S. § 14-208.40B, the application of this statute does not violate the constitutional prohibition against *ex post facto* laws.

Appeal by defendant from order dated 23 April 2009 by Judge Judson D. Deramus, Jr., in Wilkes County Superior Court. Heard in the Court of Appeals 24 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General Oliver G. Wheeler, IV, for the State.

William D. Auman for defendant-appellant.

BRYANT, Judge.

On 22 September 2004, defendant Tiffany Michelle Bowlin was convicted of two counts of indecent liberties with a child. The trial court sentenced defendant to two suspended terms of eighteen to twenty-two months in the North Carolina Department of Correction. The trial court also ordered defendant to a forty-eight-month term of supervised probation and to register as a sex offender. On 20 April 2009, the trial court held a hearing pursuant to N.C. Gen. Stat. § 14-208.40B and ordered that defendant enroll in satellite-based monitoring for the rest of her life. Defendant appeals, contending that the application of section 14-2-208.40B to her violates the constitutional prohibition against *ex post facto* laws. As discussed below, we affirm.

Facts

At the hearing pursuant to section 14-208.40B, the trial court found that defendant's offense was aggravated because it involved penetration. Defendant had stipulated to this fact at her original trial in 2004. At the hearing and on appeal, defendant does not contest the facts of the underlying case and acknowledges that these facts are sufficient under section 14-208.40B to subject her to satellite-based monitoring.

On appeal, defendant presents a single argument: the trial court erred in ordering her to enroll in lifetime satellite-based monitoring because she committed the reportable offense prior to the effective date of N.C.G.S. § 14-208.40B. As discussed below, we disagree and affirm the order of the trial court.

STATE v. BOWLIN

[204 N.C. App. 206 (2010)]

Analysis

Defendant contends that because she committed the reportable offense prior to the effective date of N.C.G.S. § 14-208.40B, the application of this statute to her violates the constitutional prohibition against *ex post facto* laws. We disagree.

Defendant acknowledges that a prior panel of this Court has already rejected this argument in *State v. Bare*, — N.C. App. —, 677 S.E.2d 518 (2009). We are bound by that determination. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (stating that, “[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”).

Defendant contends, however, that the record before this Court in her case differs from that in *Bare*. Specifically, defendant draws our attention to the North Carolina Department of Correction’s “Sex Offender Management Interim Policy” which was not part of the record in *Bare*. This policy is also not part of the record in the instant case, but defendant asks this Court to take judicial notice of it. However, as defendant notes in her brief, another panel of this Court has rejected the identical argument she now advances in *State v. Vogt*, — N.C. App. —, 685 S.E.2d 23 (2009). In *Vogt*, we stated:

Although we do not dispute the Court’s authority to judicially notice the interim guidelines, *State ex rel. Utilities Commission v. Southern Bell Telephone and Telegraph Co.*, 289 N.C. 286, 288, 221 S.E.2d 322, 323 (1976), we are not persuaded that we should exercise our discretion to do so given that the parties did not bring these guidelines to our attention or discuss them in their briefs. N.C. Gen. Stat. § 8C-1, Rules 201(c) and (f). A decision to judicially notice the interim guidelines in this case does not simply have the effect of filling a gap in the record or supplying a missing, essentially undisputed fact; instead, judicially noticing the interim guidelines in this case introduces a large volume of additional information which has not been subjected to adversarial testing in the trial courts. In the absence of a full and thorough discussion of the contents and implications of these documents by the parties and in view of their interim nature, we are concerned about basing a decision of the nature suggested by the dissent upon them, since acting in that fashion might well put this Court in the position of a trier of fact, a role that we are not sup-

STATE v. BOWLIN

[204 N.C. App. 206 (2010)]

posed to occupy. *Hobbs Staffing Servs., Inc. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 226, 606 S.E.2d 708, 711 (2005) (stating that an appellate court should not initially decide questions of fact).

Id. at —, 685 S.E.2d at 26. The panel in *Vogt* went on to state that, even were the policies judicially noticed, “we are not persuaded that they constitute a material difference between the record in this case and that before the Court in *Bare*.” *Id.* at —, 685 S.E.2d at 26-27. We are bound by *Vogt* as well as by *Bare*, and defendant presents no additional material in the record nor arguments in her brief. *See In re Appeal from Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. The trial court did not err in entering the order.

Affirmed.

Judges STEELMAN and BEASLEY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 MAY 2010)

BEARD v. CUMBERLAND CNTY. HOSP. No. 09-1043	Cumberland (08CVS11075)	Affirmed
BRINN v. WEYERHAEUSER CO. No. 09-403	Indus. Comm. (IC821807)	Affirmed
BULLOCK v. BULLOCK No. 09-1214	Vance (07CVS1025)	Affirmed
CITY OF ASHEVILLE v. HUSKEY No. 09-1237	Buncombe (09CVS2040)	Reversed and Remanded
CLARK v. SUTTON No. 09-1118	Randolph (05CVD2554)	Affirmed
CROCKER v. GRIFFIN No. 09-1000	Transylvania (09CVS49)	Affirmed
DURUANYIM v. DURUANYIM No. 09-1260	Mecklenburg (02CVD22666)	Reversed and Remanded
GORE v. SW. AIRLINES CO. No. 09-1300	Indus. Comm. (025121)	Dismissed
GRAY v. GRAY No. 09-1687	Stokes (06CVD483)	Dismissed
IN RE A.S. No. 09-1152	Mecklenburg (06J1365)	Dismissed
IN RE J.P. No. 09-1222	Davidson (08J71-72)	Remand
IN RE M.W. No. 09-941	Wake (08JB464)	Affirmed
LAWSON v. ELEC. DATA SYS. No. 09-1106	Indus. Comm (576800) (453801)	Affirmed
MALONE v. STEELE No. 09-554	Burke (08CVS275)	Dismissed
N.C. R.R. CO. v. BELL No. 09-1309	Carteret (07CVS553)	Affirmed
PARROTT v. KRISS No. 09-593	Lenoir (98CVD1470)	Affirmed in part, vacated and remanded in part
SAWYER v. MKT. AM., INC. No. 09-922	Guilford (06CVS4430)	Affirmed

STATE v. AUTRY No. 09-1423	Swain (08CRS050995) (09CRS122)	No Error
STATE v. BROWN No. 09-1293	Rowan (03CRS58896-98) (03CRS58891-93)	No Error
STATE v. BROWN No. 09-1163	Carteret (08CRS354-357) (08CRS50452) (08CRS349)	No Error
STATE v. CHILES No. 09-548	Mecklenburg (05CRS212906) (05CRS212969) (05CRS212905) (05CRS212971)	Affirmed
STATE v. COOPER No. 09-795	Durham (07CRS13547) (07CRS50074)	No Error
STATE v. FRAZIER No. 09-1503	Nash (07CRS57398) (07CRS57373)	No Error
STATE v. GREENE No. 09-1098	Mecklenburg (07CRS726498)	No Error
STATE v. MILES No. 09-1055	Guilford (08CRS98346-47)	No Error
STATE v. MILLING No. 09-1216	Buncombe (08CRS357) (08CRS354-355)	No Error
STATE v. MOLIX No. 09-1435	Mecklenburg (07CRS205440)	No prejudicial error
STATE v. MORENO No. 09-1089	Chatham (08CRS50965) (08CRS4765)	Reversed
STATE v. PETERSON No. 09-998	Forsyth (07CRS26451) (07CRS53602)	No Error
STATE v. SEXTON No. 09-1311	Buncombe (06CRS54479) (06CRS454)	Vacated in part
STATE v. SIMMONS No. 09-1093	New Hanover (07CRS58304-09)	No prejudicial error
STATE v. TAYLOR No. 09-885	Wake (08CRS19033)	Dismissed

STATE v. TAYLOR No. 09-988	Mecklenburg (06CRS206554-5)	No prejudicial error
STATE v. TUCKER No. 09-1112	Rowan (06CRS57538-40) (06CRS57256) (06CRS57259-63)	No Error
STATE v. TURNER No. 09-1116	Columbus (07CRS1624-31)	No Error
STATE v. WILLIAMS No. 09-837	Henderson (06CRS50398) (06CRS50399) (06CRS50397) (07CRS53)	Affirmed
STATE v. WITHERSPOON No. 09-1303	Cleveland (09CRS853) (06CRS6575)	No Error
STATE v. WRIGHT No. 09-1062	Forsyth (07CRS58188)	No Error
WILLIAMS v. LAW COMPANIES GRP., INC. No. 09-418	Indus. Comm. (IC071608)	Affirmed

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

TIMOTHY G. KORNEGAY, PLAINTIFF V. ASPEN ASSET GROUP, LLC, C. STEVE CLARDY, MICHAEL H. CLARDY, CARLTON S. CLARDY, JR., ROCKING B. FARMS, LLC, BASIC ELECTRIC COMPANY, INC., AND EARTH PRODUCTS COMPANY, LLC, DEFENDANTS

No. COA09-71

(Filed 1 June 2010)

1. Employer and Employee— compensation—existence of agreement—offer and acceptance

In a contract action over disputed employment compensation, there was sufficient evidence of an offer and acceptance to warrant denial of defendant's motion for JNOV where plaintiff testified that he was offered the job in a conversation with defendant Steve Clardy, with the written agreement to follow.

2. Employer and Employee— existence of contract—reference to profits—not unduly vague

The trial court did not err in denying the defendant's motion for a JNOV in an employment contract action that concerned the division of profits. Plaintiff's evidence was sufficient to require that a jury decide whether a contract existed; no case was found suggesting that a reference to "profits" in an alleged contract is not sufficiently specific or certain to give rise to a contract.

3. Employer and Employee— contract—compensation provisions—divisible

Two portions of a disputed employment contract concerning compensation were divisible where two promises by defendant Steve Clardy were in exchange for two distinct return promises by plaintiff. The promises were not interdependent in any way.

4. Employer and Employee— wage and hour claim—bonus—notice of forfeiture

In a wage and hour claim, there was nothing to suggest that a bonus was not due plaintiff under N.C.G.S. § 95-25.7 where defendants contended that plaintiff was notified that defendants were forfeiting the bonuses before plaintiff earned them. The General Assembly did not intend to allow a bonus or commission to be cancelled or forfeited with the use of a notice as vague as the memo in question here.

5. Employer and Employee— compensation—bonuses for real estate investments—reasonable time for resale

The trial court did not err by allowing plaintiff to proceed under the “reasonable time for resale” rule in an action involving bonuses for real estate investments.

6. Employer and Employee— wage and hour claim—failure to pay bonuses—statute of limitations

The trial court properly rejected defendant’s statute of limitations defense to a wage and hour claim concerning the failure to pay bonuses.

7. Discovery— sanction—additional time offered—witness made available for deposition

The trial court did not abuse its discretion in choosing as a discovery sanction an order that plaintiff make the witness available for a deposition and that defendants could have additional time. The trial court prepared a well-reasoned order of 14 pages and included a careful discussion of why the trial court had reached its decision.

8. Damages and Remedies— new trial denied—remittitur

The trial court did not abuse its discretion by denying defendants’ motion for a new trial on both liability and damages in an employment compensation action. The judgment was based on competent evidence, including both the jury’s finding of a breach of contract and the amount of damages ultimately awarded as a result of the remittitur.

9. Damages and Remedies— remittitur accepted—appeal on separate damages claim not barred

A plaintiff who accepted remittitur of the jury damages on a contract claim was not barred from bringing a cross-appeal on liquidated damages and attorney fees on a wage and hour claim, which is a separate claim for relief with separate remedies.

10. Employer and Employee— wage and hour claim—liquidated damages—decided by court rather than jury

The trial court did not err in a wage and hour claim by deciding the issue of liquidated damages rather than submitting it to the jury. Plain statutory language requires the employer to show “to the satisfaction of the court” that its actions were in good faith and based on reasonable grounds.

11. Constitutional Law— right to trial by jury—liquidated damages—property rights not involved

A liquidated damages issue in a wage and hour claim was properly decided by the trial court where defendant asserted that the failure to submit the claim to the jury violated his constitutional right to a jury trial in actions respecting property. There is no basis for distinguishing between liquidated damages under the Wage and Hour Act and punitive damages and Rule 11 sanctions, which do not involve property rights and a constitutional right to a jury trial.

12. Employer and Employee— wage and hour claim—waiver of defenses

The issue of waiver of defenses to a wage and hour claim was not addressed where plaintiff impliedly consented to trial of the issue.

13. Damages and Remedies— liquidated damages—denied

The trial court did not err by denying plaintiff liquidated damages on an employment compensation claim where plaintiff's arguments required the adoption of his construction of the evidence concerning the existence of a contract. The trial court had denied plaintiff's motions for a directed verdict and a JNOV on that issue.

14. Employer and Employee— compensation claim—findings—sufficiently specific

Findings of fact were sufficiently specific where they were adequate to set out the factual basis for the trial court's conclusions and to explain its rationale.

15. Attorney Fees— denial of motion—employment compensation action

The trial court did not abuse its discretion by denying plaintiff's motion for attorney fees in an action involving employment compensation.

Appeal by defendants and cross-appeal by plaintiff from judgment entered 5 February 2008 and order and modified judgment entered 4 June 2008 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 June 2009.

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

Bishop, Capitano & Moss, P.A., by J. Daniel Bishop and Joseph W. Moss, Jr., for plaintiff.

James, McElroy & Diehl, P.A., by Gary S. Hemric, John S. Arrowood, John R. Buric, and Preston O. Odom, III, for defendants.

GEER, Judge.

This appeal arises out of a dispute over an alleged bonus compensation scheme between plaintiff Timothy G. Kornegay and his employer, defendant Aspen Asset Group, LLC (“Aspen”), which is owned by defendants C. Steve Clardy (“Steve Clardy”), Michael H. Clardy (“Mike Clardy”), and Carlton S. Clardy, Jr. (“Chip Clardy”). Defendants have appealed from the trial court’s denial of their motion for judgment notwithstanding the verdict (“JNOV”), contending plaintiff presented insufficient evidence of an enforceable oral contract. Because we believe the evidence, taken in the light most favorable to plaintiff, was sufficient to allow the jury to determine the existence of an enforceable oral contract, we affirm the trial court’s denial of defendants’ motion for JNOV.

Defendants also argue the trial court erred in remitting the jury’s damages award rather than granting defendants’ request for a new trial on both liability and damages. Based upon our review of the jury’s verdict, the evidence, and the issues in dispute, we hold that the trial court did not abuse its discretion in denying a new trial on all issues.

Plaintiff has cross-appealed from the trial court’s denial of his motion for attorneys’ fees and liquidated damages under the North Carolina Wage and Hour Act (“NCWHA”). We hold that the trial court’s findings of fact, which are supported by competent evidence, are sufficient to support its denial of liquidated damages and attorneys’ fees.

Facts

Plaintiff met the Clardys in the early 1970s when he attended high school with Mike and Chip Clardy. Steve Clardy, the father of Mike and Chip, was the boys’ scoutmaster in their Boy Scouts troop. The Clardys own Aspen (an investment holding company that buys, sells, and manages real estate investments), as well as defendants Rocking B. Farms, LLC, Basic Electric Company, Inc., and Earth Products Company, LLC. The parties kept in touch over the years, and

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

when plaintiff left another job in May 1996, he sent the Clardys his resume and told them he was looking for work.

After receiving plaintiff's resume, Chip Clardy contacted plaintiff and indicated that Steve Clardy wanted to speak with him about a possible job opportunity. Plaintiff and Steve Clardy met approximately eight times between July and September 1996, discussing various ways that plaintiff might work for the Clardys. The content of those discussions is at the heart of the dispute in this case.

Plaintiff contends that in the course of those discussions, he and Steve Clardy entered into an oral employment contract. According to plaintiff, his duties under the contract were to identify and present to the Clardys attractive real estate investment opportunities and, if given approval, to acquire, modify, and resell or lease those properties for profit. In exchange, plaintiff would receive an annual salary of \$72,000.00 and bonuses under a compensation scheme based on a system of "origination" and "implementation." "Origination" included scouting out available properties and determining which properties might be a good investment. "Implementation" involved plaintiff's performing required due diligence, closing the sale, and handling the improvements and leasing of the property. Plaintiff contends that he was supposed to receive 20% of the profits from investment projects he originated and implemented and would receive "fair" compensation for implementing investment projects that he did not originate.

Defendants, on the other hand, argue that the conversations between plaintiff and Steve Clardy were nothing more than negotiations and that the parties intended to enter into a written agreement at a later date. It is undisputed by the parties that no written agreement exists. Although plaintiff and Steve Clardy exchanged several drafts of an agreement, none of the drafts was ever agreed upon or signed.

Plaintiff worked for Aspen from 1 October 1996 through 25 June 2004. During his employment, Aspen paid plaintiff \$72,000.00 annually, but never paid any bonuses. The parties agree that plaintiff originated eight properties for the Clardys. Plaintiff claims, however, that he also originated one more property, the Love property. After all of these properties had been acquired by Aspen, plaintiff, in one of his paychecks, received a handwritten note dated 27 June 2002 that stated:

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

Sal[ary] same as now 72,000.00 annual.

No Bonuses

No Commissions

No Nothing

Until

Aspen sees fit & confident we are making money.

Subsequently, on 11 September 2003, Aspen sold three of the properties. The other six properties remained unsold as of the trial.

On 14 December 2004, plaintiff brought suit against defendants in Mecklenburg County Superior Court. Plaintiff alleged that Aspen breached their contract by failing to pay him bonuses of 20% of the profits of investments he originated and implemented and bonuses of a “fair” percentage of the profits of investments he implemented but did not originate. Plaintiff also asserted claims against all defendants for (1) violation of the NCWHA, (2) *quantum meruit*, and (3) fraud. The case was ultimately assigned to the Business Court.

Defendants moved for summary judgment on 5 April 2006, while plaintiff moved for partial summary judgment on 11 May 2006. On 27 September 2006, the trial court entered an order denying summary judgment on plaintiff’s breach of contract claim for the 20% bonus on investments he originated and implemented, but granting summary judgment to defendants on plaintiff’s breach of contract claim for the “fair” bonuses on investments he implemented but did not originate. The trial court permitted plaintiff to proceed against (1) all defendants under the NCWHA; (2) only Aspen, Rocking B. Farms, Basic Electric, and Earth Products in *quantum meruit*; and (3) only Aspen and Steve Clardy for fraud.

At the close of plaintiff’s case at trial, the trial court directed a verdict in favor of Rocking B. Farms, Basic Electric, and Earth Products on all claims and in favor of all defendants on the fraud claim. The court further concluded that plaintiff was entitled only to nominal damages on the *quantum meruit* claim asserted against all defendants. The trial court denied renewed directed verdict motions at the close of all the evidence and submitted the surviving claims to the jury.

On 12 December 2007, the jury rendered its verdict, making special findings of fact. It found that plaintiff and Aspen had entered into a contract and that Aspen had breached that contract. It further

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

found that Steve and Mike Clardy, but not Chip Clardy, were statutory employers of plaintiff under the NCWhA. The jury next found that plaintiff had originated and implemented the Love property and that defendants could have sold the six unsold properties for a profit in the exercise of reasonable care and judgment. The jury concluded that plaintiff was entitled to damages in the amount of \$996,147.60.

Plaintiff moved for entry of judgment on the jury's verdict and for an award of liquidated damages under the NCWhA in the amount of the verdict, for attorneys' fees in the amount of \$315,802.21, and costs of \$9,869.45. At the hearing on plaintiff's motion, plaintiff also submitted a request for prejudgment interest in the amount of \$124,518.00.

On 5 February 2008, the trial court entered judgment on the jury's breach of contract verdict in the amount of \$996,147.60. The court concluded that the breach of contract amount should also be considered wages under the NCWhA and that Aspen, Steve Clardy, and Mike Clardy were liable jointly and severally for the unpaid wages. With respect to the request for liquidated damages, the trial court found that defendants had acted in good faith in discharging their obligations and had a reasonable basis for believing that their refusal to pay bonuses was not in violation of the NCWhA. The trial court, therefore, exercised its discretion not to award liquidated damages. The court also declined to award attorneys' fees although it did grant the request for costs. The trial court awarded prejudgment interest as to the three properties that had actually been sold, but declined to award prejudgment interest as to the remaining six properties because the court could not determine when the bonuses on those properties became due. Finally, the court dismissed the claim for *quantum meruit* since the jury had awarded damages for breach of an express contract.

Defendants moved for JNOV or, in the alternative, for (a) a new trial on both liability and damages; (b) a new trial on damages; or (c) remittitur of the damage award. In an order entered 28 April 2008, the trial court concluded that it could not reconcile the jury's award of \$996,147.60 with the evidence admitted at trial and plaintiff's request to the jury for \$825,070.40. The trial court noted that plaintiff had objected to remittitur and, therefore, granted a new trial as to damages only.

Subsequently, in an order dated 29 May 2008, the trial court stated that plaintiff had clarified that he did not intend to object to remitti-

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

tur. The trial court, therefore, denied the motion for a new trial on both liability and damages, and stated that it would be entering an amended judgment. The modified judgment was signed on 29 May 2008 and awarded plaintiff damages in the amount of \$825,070.40 with prejudgment interest on only \$58,424.00 of the judgment. Defendants timely appealed, and plaintiff cross-appealed.

Defendants' AppealI. Motion for JNOV.

Defendants contend that the trial court erred in denying their motion for JNOV. "When determining the correctness of the denial [of a motion] for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991) (internal citations omitted). "A motion for judgment notwithstanding the verdict should be denied if there is more than a scintilla of evidence to support the plaintiff's *prima facie* case." *Scarborough v. Dillard's Inc.*, 188 N.C. App. 430, 431, 655 S.E.2d 875, 876 (2008), *rev'd on other grounds*, 363 N.C. 715, 693 S.E.2d 640 (2009).

A. Breach of Contract Claim.

Defendants first argue that the trial court should have granted their motion for JNOV because plaintiff presented insufficient evidence to create a jury question as to the existence of an enforceable, divisible contract. As an initial matter, defendants' arguments raise two questions: (1) whether there was an offer and acceptance of the terms of employment, and (2) "if so, were the terms agreed upon sufficiently definite and certain to give rise to a contract enforceable by a court of law?" *Williams v. Jones*, 322 N.C. 42, 48, 366 S.E.2d 433, 437 (1988) (upholding trial court's denial of JNOV motion). We address each question separately.

1. Whether there was offer and acceptance.

[1] Defendants first assert that the discussions between Steve Clardy and plaintiff were merely negotiations to see if they could agree on terms and that the parties intended to enter into a written contract at a later date, which never happened. Our courts have held that when "it appears that the parties are merely negotiating to see if they can agree upon terms, and that the writing is to be the contract, then

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

there is no contract until the writing is executed.” *Elks v. North State Ins. Co.*, 159 N.C. 619, 624, 75 S.E. 808, 811 (1912).

Defendants primarily rely upon *Cole v. Champion Enters., Inc.*, 496 F. Supp. 2d 613 (M.D.N.C. 2007), *aff’d*, 305 Fed. Appx. 122 (4th Cir. 2008) (unpublished), in support of their position. In *Cole*, the employee sought to enforce an alleged oral agreement regarding conditions for his continued employment, while the defendant employer contended that no agreement had ever been reached. The district court acknowledged that, under North Carolina law, “where the evidence is sufficient to support plaintiff’s contention that a definite oral agreement was made by the parties, the contract is complete even though the parties contemplated that they would ultimately reduce the agreement to writing.” *Id.* at 621. Nevertheless, “if it appears that the parties are merely negotiating to see if they can agree upon terms, and that the writing is to be a contract, then there is no contract until the writing is executed.” *Id.* at 622. On this point, the court observed: “‘If the parties intend to signal their agreement only by the execution of a written document and do not intend to be bound unless and until all parties sign, no amount of negotiation or oral agreement, no matter how specific, will result in the formation of a binding contract.’” *Id.* (quoting *Dow Chem. Co. v. Gen. Elec. Co.*, 2005 WL 1862418, *32, 2005 U.S. Dist. LEXIS 40866, *88 (E.D.Mich. Aug. 4, 2005)).

In deciding that no oral agreement was ever reached in *Cole*, the district court pointed out first that it was undisputed that the oral discussions could not constitute a verbal agreement because, given the nature of the employee’s position, all terms of his employment were subject to approval by the Board of Directors. *Id.* at 624-25. Although the Board ultimately did approve some of the terms and conditions of employment, the district court concluded that the approval, while necessary, was not sufficient for a contract since several of the terms were too indefinite to be enforceable without further negotiations and, in any event, “the alleged contract that [the employee sought] to enforce differ[ed] in concept fundamentally from what the Board actually considered and approved.” *Id.* at 625.

The court pointed out that, subsequently, the terms included within the Board approval (such as a salary increase) were not put into effect, but rather the parties exchanged draft agreements in which the employee sought revisions that were irreconcilable with the terms approved by the Board or were in addition to those terms. *Id.* at 627, 629. Moreover, in the course of those negotiations, none of the parties “suggested that some ‘oral agreement’ was already in

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

place.” *Id.* at 629. Based on these facts, the district court concluded that the “undisputed facts all demonstrate the existence of ongoing negotiations, rather than a ‘mere memorial’ of an already agreed-upon contract.” *Id.*

Recently, the same judge summarized the significant factors leading to the conclusion in *Cole* when distinguishing that opinion:

Defendant, in arguing that no contract existed, urges this court to follow the reasoning of *Cole v. Champion Enterprises, Inc.*, 496 F.Supp.2d 613 (M.D.N.C.2007). While there is language in *Cole* supporting Defendant’s position, the facts in *Cole* are inapposite. The plaintiff in *Cole* alleged that he had an oral employment agreement which was enforceable. The court, however, found that there was no agreement because, among other things, any such employment contract required corporate Board approval, which was never given, all previous employment contracts between the parties had been reduced to writing, and there was never a meeting of the minds on the terms of the agreement, as those terms were still being negotiated by the parties. As the Fourth Circuit noted in affirming the decision of the district court: “These negotiations prevented [the parties] from reasonably believing that they were already obligated by an enforceable agreement” *Cole v. Champion Enters., Inc.*, 305 F. App’x. 122, 129 (4th Cir.2008).

TSC Research, LLC v. Bayer Chems. Corp., 2009 WL 2168965, *4 (M.D.N.C. July 16, 2009) (unpublished).

While defendants point to the fact that plaintiff and Steve Clardy anticipated reducing their agreement to writing, but did not do so, we believe, as was true in *TSC Research*, that the factors present in *Cole* are not present in this case. Since this was the first employment agreement, the parties had no prior practice of reducing contracts to writing, there was no evidence that plaintiff’s agreement required approval by anyone apart from Steve Clardy, and plaintiff was not attempting to enforce terms beyond those addressed in his meeting with Steve Clardy.

Instead, there is sufficient evidence of an offer and acceptance to warrant denial of the motion for JNOV. Plaintiff testified that at the initial September meeting, Steve Clardy “offered [him] the job to originate to be a catalyst for, to initiate real estate investments, and to implement them.” According to plaintiff, he and Steve Clardy dis-

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

cussed the terms Steve Clardy had offered, and plaintiff “accepted the terms.” Steve Clardy then said that after plaintiff started work, they would get together and “write up the agreement that [they] already made.” Plaintiff testified that after he began working for Aspen, he and Steve Clardy reviewed the terms they had agreed on, and Steve Clardy told plaintiff to “put into written form the agreement that we had made.”

Steve Clardy testified that he and plaintiff orally agreed they would split the profits from properties plaintiff originated and implemented 80/20. He further explained:

After we made what we thought was some kind of employment terms, then I told him that he and I and [another employee] would get together immediately. And I think we did that within 30 days. We met for about an hour or so on our first meeting.

Q. What was the purpose of that three-way meeting with you, [plaintiff], and [the other employee]?

A. For [plaintiff] and I to convey our thoughts to [the other employee] to put in writing.

Later, when Steve Clardy was asked, “Twenty percent of that is what you promised [plaintiff]?”, he responded: “No. I never promised—yes. *That was our agreement, originally.* But we never came to an agreement. But yes, if our agreement had been consummated, yes.” (Emphasis added.) It was up to the jury to decide whether this testimony acknowledged an oral agreement to later be memorialized in writing or whether these were just negotiations.

Defendants point to plaintiff’s testimony about one of the written draft agreements that “[i]t was obvious in that agreement” that plaintiff and Steve Clardy “had differences with it.” This testimony, when viewed in the light most favorable to plaintiff, does not require a conclusion, as in *Cole*, that the parties had not in fact reached an agreement and still were negotiating, but rather could be understood to mean either (1) that Steve Clardy was attempting, as plaintiff has contended, to alter the existing oral agreement or (2) that the parties were simply having difficulty reducing the agreed-upon terms to writing. Which construction was correct or whether there was no agreement in the first place was a question for the jury.

Our Supreme Court has held that “[w]here the evidence presented at trial is sufficient to support plaintiff’s contention that a def-

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

inite agreement was made by the parties, the contract is complete even though the parties contemplated reducing the agreement to writing.” *Williams*, 322 N.C. at 52, 366 S.E.2d at 440. In *Williams*, 322 N.C. at 47, 366 S.E.2d at 437, the plaintiff had appealed the trial court’s granting of defendants’ motion for JNOV, contending that a reasonable jury could conclude that a discussion between the plaintiff and the defendants constituted an oral contract. The Supreme Court agreed that the trial court erred, explaining that the record contained evidence that a firm offer was made by the defendants to give the plaintiff a sum of money in exchange for the right to sell the plaintiff’s technology and that the plaintiff had accepted that offer. *Id.* at 49, 366 S.E.2d at 438. The Court reasoned that the “protestations of [defendants] that nothing more than preliminary negotiations were discussed merely contradicted plaintiff’s testimony” and was an issue for the jury. *Id.* at 48, 366 S.E.2d at 438.

Similarly, here, the testimony from plaintiff and Steve Clardy is more than a scintilla of evidence that Steve Clardy made an offer to plaintiff regarding the employment terms and that plaintiff accepted that offer even though the parties intended to later have a written agreement. Defendants’ assertion that those were preliminary negotiations “merely contradicted” that testimony and was, therefore, an issue for the jury. *See also N.C. Nat’l Bank v. Wallens*, 26 N.C. App. 580, 583-84, 217 S.E.2d 12, 15 (explaining that even if contracting parties expressly contemplate later written document, oral agreement becomes effective absent explicit statement by one of parties conditioning effectiveness on consummation of writing), *cert. denied*, 288 N.C. 393, 218 S.E.2d 466 (1975).

2. Whether the terms were sufficiently certain.

[2] Defendants next argue that even if the parties entered into an oral agreement to split the profits 80/20 on properties that plaintiff originated and implemented, there was no enforceable contract because the reference to “profits” was not sufficiently specific, and the parties did not agree on what costs would be deducted from revenues to arrive at the profits.

In *Williams*, however, the Supreme Court concluded that when “the plaintiff presented evidence which demonstrates that the terms alleged by defendants to be indefinite were in fact sufficiently well delineated to all parties,” it did not matter that it was “contested by defendants.” 322 N.C. at 52, 366 S.E.2d at 440. Defendants’ disagreement did not alter the fact that “[e]vidence which defined the terms

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

in question was presented in [the] case.” *Id.* See also *Chew v. Leonard*, 228 N.C. 181, 185, 44 S.E.2d 869, 872 (1947) (in considering alleged contract for payment of bonus if plaintiff caused \$7,000.00 reduction in production costs, holding that agreement as to what constituted reduction in production costs was not necessary to enforce contract); *Arndt v. First Union Nat’l Bank*, 170 N.C. App. 518, 523, 613 S.E.2d 274, 278 (2005) (rejecting defendants’ argument that “ ‘sketchy’ ” discussions were insufficient to comprise valid contract and finding sufficient plaintiff’s evidence that manager orally told him he would receive bonus of 20% of all net income he earned for company).

Here, like the plaintiffs in *Williams*, *Chew*, and *Arndt*, plaintiff presented evidence that would permit the jury to decide that the terms of the alleged oral contract were sufficiently definite and certain. Plaintiff testified that Steve Clardy said: “I’ll pay you a bonus which will be 20 percent of profits on the jobs you originate and implement[.]” According to plaintiff’s testimony, he and Steve Clardy further agreed that profits would be calculated by subtracting costs from revenues for jobs that plaintiff originated and implemented. Plaintiff explained that Steve Clardy defined revenues as money coming in from the sales and leasing of properties plaintiff originated and implemented and defined costs as any expenses specific to the job he worked on, including a prorated portion for office and administrative costs. Plaintiff testified that Steve Clardy then wrote out examples showing how bonuses would be calculated based on this formula.

As the Supreme Court held in *Williams*, plaintiff’s evidence is sufficient to require that a jury decide whether a contract existed. The cases relied upon by defendants—*Rosen v. Rosen*, 105 N.C. App. 326, 413 S.E.2d 6 (1992), and *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 334 S.E.2d 404 (1985)—do not require a different result. In each of those cases, the plaintiff’s evidence was lacking. In *Rosen*, 105 N.C. App. at 328, 413 S.E.2d at 8, the agreement, as proved by the plaintiff, was lacking a material term. In *Braun*, 77 N.C. App. at 84, 334 S.E.2d at 405, the plaintiff, a teacher, relied exclusively upon a letter that merely stated that the defendant school was “ ‘planning’ ” for the plaintiff to be a part of the faculty during the next school year. The Court in *Braun* upheld a directed verdict on the breach of contract claim because “[f]rom plaintiff’s evidence, it is clear that the plaintiff and defendant Mackey never reached a mutual understanding as to salary, fringe benefits, length of employment,

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

duties and responsibilities, or housing arrangements.” *Id.* at 89-90, 334 S.E.2d at 408.

Since, in this case, plaintiff offered affirmative evidence that the parties entered into an oral contract with sufficiently definite terms, the fact that defendants disputed that evidence was not sufficient under *Williams* to warrant entry of JNOV. We note further that defendants have failed to cite any decisions suggesting that an agreement to pay a percentage of “profits” is too vague to be enforced.

In our research, we have found no case in North Carolina or any other jurisdiction suggesting that a reference to “profits” in an alleged contract is not sufficiently specific or certain to give rise to a contract. *See Pratt v. Seventy-One Hawthorne Place Assocs.*, 106 S.W.3d 608, 614 (Mo. Ct. App. 2003) (“Therefore, the failure of the parties to define the term ‘net profit,’ a term commonly used . . . in contracts, does not render the contract too indefinite to be enforceable.”). We, therefore, hold that the trial court did not err in denying the motion for JNOV on this basis.

3. Indivisible vs. Divisible Contract.

[3] Defendants next argue that their motion for JNOV should have been allowed because even if the parties did enter into an oral contract, the provision entitling plaintiff to 20% of the profits from projects he originated and implemented is indivisible from an unenforceable provision. Defendants point to the portion of the alleged oral contract providing that plaintiff would receive a “fair” share of the profits from projects he implemented, but did not originate, and argue that because the trial court concluded that the promise was unenforceable, the indivisible promise to pay plaintiff 20% of the profits for projects he originated and implemented must also fail.

“‘A contract is entire, and not severable, when by its terms, nature and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration, are common each to the other and interdependent.’” *Mebane Lumber Co. v. Avery & Bullock Builders, Inc.*, 270 N.C. 337, 341, 154 S.E.2d 665, 668 (1967) (quoting *Wooten v. Walters*, 110 N.C. 251, 254, 14 S.E. 734, 735 (1892)). On the other hand, “‘a severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be.’” *Id.* at 342, 154 S.E.2d at 668 (quoting

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

Wooten, 110 N.C. at 255, 14 S.E. at 735). When a contract is severable, “‘an action may be maintained for a breach of it in one respect and not necessarily in another, or for several breaches, while in other material respects it remains intact.” *Id.* (quoting *Wooten*, 110 N.C. at 255, 14 S.E. at 735).

In *Turner v. Atl. Mortgage & Inv. Co.*, 32 N.C. App. 565, 567-68, 233 S.E.2d 80, 82, *disc. review denied*, 292 N.C. 735, 235 S.E.2d 788 (1977), a bank employee alleged that he and his employer had an oral agreement under which he was given the option to purchase five percent of the shares of the bank’s stock for four consecutive years. Commissions earned by the employee during those years would be applied toward the purchase price of the stock. *Id.* at 568, 233 S.E.2d at 82. When the bank discharged the employee without giving him his shares, he sued to recover either the amount of commissions he earned or the stock. *Id.* at 567, 233 S.E.2d at 81.

This Court held that even if the employee would be barred from suing for the stock by the statute of frauds, he could still sue for the commissions. The Court explained that “[t]he contract is divisible into two related, but not interdependent, promises: (1) to pay [the plaintiff] commissions in consideration of fees generated; and (2) to sell [the plaintiff] shares in consideration for, and in proportion to, the commissions already earned, and the number of years spent working for [the bank].” *Id.* at 571, 233 S.E.2d at 83.

Similarly, here, the two promises made by Steve Clardy were in exchange for two distinct return promises by plaintiff: (1) 20% of profits in exchange for origination and implementation of investment projects, and (2) fair treatment in exchange for implementation efforts on projects plaintiff did not originate. The two promises were not interdependent in any way and were, therefore, divisible.

B. North Carolina Wage & Hour Act Claim.

1. Forfeiture.

[4] With respect to the NCWhA claim, defendants first contend that even if an enforceable, divisible contract existed between the parties, plaintiff cannot recover the bonuses under the NCWhA because defendants notified him they were forfeiting the bonuses before plaintiff earned them. Additionally, defendants contend, as to the six unsold properties, that no bonus accrued because plaintiff’s employment terminated prior to the selling of the properties. We disagree with both arguments.

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

The NCWHA provides:

Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday either through the regular pay channels or by mail if requested by the employee. Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs. *Such wages may not be forfeited unless the employee has been notified in accordance with G.S. 95-25.13 of the employer's policy or practice which results in forfeiture. Employees not so notified are not subject to such loss or forfeiture.*

N.C. Gen. Stat. § 95-25.7 (2009) (emphasis added). N.C. Gen. Stat. § 95-25.13(3) (2009) in turn requires each employer to “[n]otify employees, in writing or through a posted notice maintained in a place accessible to its employees, at least 24 hours prior to any changes in promised wages.”

Our courts have construed N.C. Gen. Stat. § 95-25.13(3) to mean that “[o]nce the employee has earned the wages and benefits . . . , the employer is prevented from rescinding them, with the exception that for certain benefits such as commissions, bonuses and vacation pay, an employer can cause a loss or forfeiture of such pay if he has notified the employee of the conditions for loss or forfeiture in advance of the time when the pay is earned.” *Narron v. Hardee's Food Sys., Inc.*, 75 N.C. App. 579, 583, 331 S.E.2d 205, 208, *disc. review denied*, 314 N.C. 542, 335 S.E.2d 316 (1985).

On 27 June 2002, before any of the properties on which plaintiff worked were sold, defendants sent plaintiff a memo stating that they would not pay him any bonuses or commissions “until Aspen sees fit & confident we are making money.” Defendants contend that under their agreement, plaintiff only “earned” a bonus on a property when that property was sold. Defendants reason that they, therefore, properly notified plaintiff of the forfeiture of the bonuses before he had earned the bonuses. Plaintiff, on the other hand, contends the bonuses were earned once he had originated and implemented the projects and those projects increased in value, thereby making a profit.

We need not resolve the issue of when the bonuses were earned because, in any event, the June 2002 memo on which defendants rely

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

was not sufficient notification to cause a forfeiture of the bonuses. The memo did not specify the “the conditions for loss or forfeiture” of plaintiff’s bonuses. *Id.* The memo did not state that Aspen would never pay bonuses to plaintiff or that the bonuses would be lost or forfeited upon the occurrence of specified events, but rather stated “[n]o bonuses . . . until Aspen sees fit & confident we are making money.” Plaintiff testified that when he got the memo, “it shocked me and I wasn’t exactly sure whether it meant they were stopping the bonus or they were just saying the timing of the bonus would be to their discretion based on when they thought [they] were making money.” The trial judge read the memo as “suggest[ing] until the properties are sold there’s some other measure engaging that property. Not that there would never be a bonus paid.”

Defendants have argued that “an employer may *eliminate a bonus* by providing the employee with written notice before the bonus accrues.” (Emphasis added.) Yet, nothing in the memo states that Aspen is in fact eliminating the bonus. The regulations relating to the NCWHA provide that “[a]mbiguous policies and practices [relating to bonuses and commissions] shall be construed against the employer and in favor of employees.” N.C. Admin. Code tit. 13, r. 12.0307(c). The memo must, therefore, be construed against Aspen and in favor of plaintiff with the result that this ambiguous memo does not constitute notice of forfeiture within the meaning of N.C. Gen. Stat. §§ 95-25.7, 95-25.13. We do not believe that our General Assembly intended to allow a bonus or commission to be cancelled or forfeited with the use of such a vague notice.

With respect to the six unsold properties, defendants further contend that plaintiff was not entitled to a bonus because his employment ended prior to the properties being sold. In *Narron*, 75 N.C. App. at 583, 331 S.E.2d at 208 (emphasis added), this Court held:

[G]iving the statutory language its natural and ordinary meaning, the Wage and Hour Act requires an employer to notify the employee in advance of the wages and benefits which he will earn and the conditions which must be met to earn them, and to pay those wages and benefits due *when the employee has actually performed the work required to earn them*. Once the employee has earned the wages and benefits under this statutory scheme, the employer is prevented from rescinding them, with the exception that for certain benefits such as commissions, bonuses and vacation pay, an employer can cause a loss or forfeiture of such

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

pay if he has notified the employee of the conditions for loss or forfeiture in advance of the time when the pay is earned.

We have already held that the June 2002 memo did not constitute written notice of loss or forfeiture. Defendants point to no other written notice or policy that plaintiff would not receive the bonus if his employment terminated prior to the sale of the properties he originated and implemented.

Questions remain, however, regarding (1) the nature of “the conditions which must be met to earn” the bonuses, and (2) whether plaintiff “actually performed the work required to earn” the bonuses. *Id.* Plaintiff presented evidence that he earned a 20% bonus when he originated and implemented a property and that property increased in value such that defendants would receive a profit if the property were sold. Plaintiff likewise presented evidence for each of the unsold properties that he “actually performed the work required to earn” the bonuses—the origination and implementation. *Id.* The fact that the properties increased in value met the only remaining condition for a bonus. Under *Narron*, defendants were, therefore, “require[d] . . . to pay those wages . . .” *Id.*

Defendants, in arguing that no bonus was due, seek to impose an additional requirement that the bonus be “calculable” or “quantifiable” at the time of the termination of plaintiff’s employment. This argument cannot be reconciled with the plain language of N.C. Gen. Stat. § 95-25.7, which expressly addresses the payment of wages upon the termination of an employee’s employment:

Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday either through the regular pay channels or by mail if requested by the employee. *Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs.* Such wages may not be forfeited unless the employee has been notified in accordance with G.S. 95-25.13 of the employer’s policy or practice which results in forfeiture. Employees not so notified are not subject to such loss or forfeiture.

(Emphasis added.) If, as defendants urge, the bonus must be calculable as of the date of termination, then the sentence italicized above would be rendered meaningless. It is a fundamental principle of statutory construction that courts will not interpret a statute in a

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

manner that negates any portion of it. *See, e.g., State v. Ward*, 31 N.C. App. 104, 106, 228 S.E.2d 490, 491 (1976) (“It is presumed that no meaningless or useless words or provisions are used in a statute, but that each word or provision is to be given some effect.”). Accordingly, under N.C. Gen. Stat. § 95-25.7, it is immaterial that a bonus is not “calculable” as of the date of the termination of employment if it is calculable at some later date.

Defendants point to *Moses H. Cone Mem’l Health Servs. Corp. v. Triplett*, 167 N.C. App. 267, 605 S.E.2d 492 (2004), as supporting their requirement that a bonus be “calculable” or “quantifiable.” *Moses H. Cone*, however, did not address the payment of a bonus following termination of employment, but rather only whether the employer could change mid-year its formula for calculating a bonus due under a year-end bonus plan. Under either formula, the bonus was calculated based on the employee’s professional productivity as determined on the last day of the 12th month of the year. Consequently, no particular amount was earned until the year was completed. *Moses H. Cone* held only that when the determination of the amount of a bonus occurred at the end of the year, then an employer could change the formula for calculating the bonus mid-year upon proper notice. The opinion used “calculable” and “quantifiable” in the same sense as *Narron* used “earned.” Nothing in *Moses H. Cone* overrides the plain language of N.C. Gen. Stat. § 95-25.7—indeed, this Court could not do so.

Defendants rely on *McCullough v. Branch Banking & Trust Co.*, 136 N.C. App. 340, 524 S.E.2d 569 (2000), for the proposition that the termination of plaintiff’s employment ended any obligation to pay him bonuses on unsold properties. The issue in *McCullough* was whether the trial court erred in failing to instruct the jury that the plaintiff—whose employment terminated prior to payment of a year-end bonus—was entitled to receive the bonus unless the employer notified him in writing that the bonus was forfeited if his employment terminated before the plan year expired. The plaintiff in *McCullough* admitted that the employer had not, at the start of the plan, decided what to do regarding the bonus plan in the event an employee left employment before year end. This Court, therefore, concluded that when the employer decided to have a policy of forfeiture of the bonus upon termination before the plan’s year end, there was no change to the bonus plan and thus no requirement of written notice under N.C. Gen. Stat. § 95-25.13 (requiring prior notice of “changes” in promised wages).

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

Here, in contrast, defendants do not point to any evidence that prior to the termination of plaintiff's employment, defendants adopted a policy, written or unwritten, requiring forfeiture of a bonus for any property not sold as of the date of termination. In *McCullough*, a forfeiture policy existed, but was not disclosed to the plaintiff. While defendants, in this case, argue that there was no discussion of what would occur if plaintiff's "employment ended before the sale of a property he originated and implemented," in *McCullough*, the plaintiff admitted that there was discussion, and the employer had not, at the start of the plan, decided what to do. Finally, in *McCullough*, the terms of the bonus plan provided for calculation of the bonus based on the plaintiff's total year's performance. Here, plaintiff performed everything that was required of him as a prerequisite for the bonus: he originated and implemented the properties. Consistent with *Narron*, he had actually performed all the work required of him regarding the bonus. And, the properties had increased in value sufficient to create a profit giving rise to a bonus. Nothing in *McCullough* suggests that a bonus was not due plaintiff under N.C. Gen. Stat. § 95-25.7.

2. Reasonable Time for Resale Rule.

[5] Further, we do not agree with defendants' assertion that *McCullough* precludes plaintiff's argument that his bonus should be calculated for the unsold properties by determining property values based on a reasonable time for resale. There is no analysis in *McCullough* relating to that issue. While arguably the language of N.C. Gen. Stat. § 95-25.7 might suggest that no bonus was due until the property was actually sold—with the bonus being calculated based on the profit at that sale—since neither party has addressed this issue, neither do we.

Defendants, however, also argue that the "reasonable time for resale" rule cannot apply to this set of facts because the rule applies only when a contract is silent as to the date for calculating profits, and plaintiff testified that the bonus became payable upon the date of sale of the property. This rule allows a plaintiff to recover " 'profits which would have been made upon a resale of the property in the exercise of reasonable care and judgment.' " *Cook v. Lawson*, 3 N.C. App. 104, 108, 164 S.E.2d 29, 32 (1968) (quoting *Newby v. Atl. Coast Realty Co.*, 180 N.C. 51, 54, 103 S.E. 909, 910 (1920)).

Defendants rely upon *Sockwell & Assocs. v. Sykes Enters., Inc.*, 127 N.C. App. 139, 142, 487 S.E.2d 795, 797 (1997) (emphasis added),

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

in which this Court noted: “Our courts have held that *where no date for payment is specified in the contract*, the courts will presume a reasonable time.” Our appellate courts have, however, three times applied the “reasonable time for resale” rule to contracts providing that proceeds or profits would be divided upon sale of the property. *See Newby*, 180 N.C. at 54, 103 S.E. at 910, (holding that when contract between parties provided that profits would be divided when land was ultimately sold, plaintiff was entitled to “one-half the profits which would have been made upon a resale of the property in the exercise of reasonable care and judgment”); *East Coast Dev. Corp. v. Alderman-250 Corp.*, 30 N.C. App. 598, 610, 228 S.E.2d 72, 81 (1976) (holding that reasonable time for resale rule applied when contract provided that proceeds would be equally divided upon sale of property); *Cook*, 3 N.C. App. at 108, 164 S.E.2d at 32 (holding that when parties had agreement to split profits upon resale of property, proper measure of damages was half of profits that would have been made upon resale of property in exercise of reasonable care and judgment). Defendants do not distinguish *Newby*, *East Coast*, or *Cook*, and we find them controlling. Accordingly, the trial court did not err in allowing plaintiff to proceed under the “reasonable time for resale” rule.¹

3. Statute of Limitations.

[6] Finally, defendants argue that the trial court should have granted their motion for JNOV on the NCWHA claim because the claim is barred by the two-year statute of limitations for actions to recover unpaid wages. *See* N.C. Gen. Stat. § 95-25.22(f) (2009). Defendants contend the statute began running when defendants notified plaintiff in the 27 June 2002 memo that they would not pay him any bonuses “until Aspen sees fit & confident we are making money.” We disagree.

In *Hamilton v. Memorex Telex Corp.*, 118 N.C. App. 1, 9, 454 S.E.2d 278, 282, *disc. review denied*, 340 N.C. 260, 456 S.E.2d 830, 831 (1995), this Court rejected an employer’s argument that the statute of limitations on an unpaid wage claim starts running when the employer notifies its employees of its change in policy. The Court explained that “ [t]he statute begins to run on the date the promise is broken. In no event can the limitations period begin to run until the

1. Defendants rely upon the same argument to challenge (1) the trial court’s denial of their motion to exclude evidence of the value of the properties originated and implemented by plaintiff as of the dates they could reasonably have been re-sold and (2) the jury charge and verdict issues related to the six unsold properties. Because we hold that the trial court properly applied this rule given the facts of this case, we also overrule these assignments of error.

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

injured party is at liberty to sue.’ ” *Id.* (quoting *Glover v. First Union Nat’l Bank*, 109 N.C. App. 451, 455, 428 S.E.2d 206, 208 (1993) (holding that statute of limitations did not begin running when employer amended retirement plan, but rather when employer refused to pay employee his retirement benefits). The Court reasoned that because “the plaintiffs suffered no injury until the defendant failed to pay them for the vacation days they had allegedly earned in 1988,” the statute of limitations did not bar their claims. *Id.*

In this case, then, the statute of limitations did not begin running until the bonuses were payable—upon the property’s resale—and defendants failed to pay them. That date was the date that defendants broke their promise to plaintiff. Although defendants point to the 27 June 2002 memo as constituting the triggering date, that memo did not unequivocally state that no bonus would be paid and, indeed, no bonus was yet due. *Hamilton*, therefore, controls. Since the earliest date that a property was sold was 11 September 2003, and plaintiff filed his claims on 14 December 2004, within two years of the triggering date, the trial court properly rejected defendants’ statute of limitations defense.

II. Failure to Exclude Expert Witness.

[7] Defendants also contend that the trial court abused its discretion in denying their motion to exclude the testimony of plaintiff’s expert witness, Bruce Tomlin. Defendants argue that Tomlin’s testimony and reports, which dealt with the value of the properties originated and implemented by plaintiff, should have been excluded pursuant to Rule 37(b)(2) of the Rules of Civil Procedure because plaintiff failed to seasonably supplement his original designation of expert witnesses served on 18 November 2005 and failed to comply with the deadline for completing discovery set out in the trial court’s Case Management Order.

The trial court, instead of excluding the witness, ordered plaintiff to make the witness available for a deposition on 10 days notice on a date and time of defendants’ choosing, to reimburse defendants for the costs of the deposition (excluding attorneys’ fees), and to pay defendants’ attorneys’ fees and expenses in pursuing the motion for sanctions. The trial court further provided that defendants would be allowed additional time to serve their expert witness designation and “if the Defendants, despite their best efforts, are unable to meet [plaintiff’s] expert evidence in advance of the 23 April 2007 trial date, the Court will entertain a motion to continue.”

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

“ ‘The choice of sanctions under Rule 37 lies within the court’s discretion and will not be overturned on appeal absent a showing of abuse of that discretion.’ ” *Atl. Veneer Corp. v. Robbins*, 133 N.C. App. 594, 598, 516 S.E.2d 169, 172 (1999) (quoting *Vick v. Davis*, 77 N.C. App. 359, 361, 335 S.E.2d 197, 199 (1985), *aff’d per curiam*, 317 N.C. 328, 345 S.E.2d 217 (1986)). This Court will reverse a trial court’s choice of sanctions only if the decision is “ ‘manifestly unsupported by reason.’ ” *Henderson v. Wachovia Bank of N.C., N.A.*, 145 N.C. App. 621, 629, 551 S.E.2d 464, 470 (quoting *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 195, 511 S.E.2d 31, 34 (1999)), *disc. review denied*, 354 N.C. 572, 558 S.E.2d 869 (2001).

Defendants make no serious argument in their brief as to why the trial court’s choice of the alternative sanction was an abuse of discretion. The trial court prepared a well-reasoned order of 14 pages, including detailed findings of fact and conclusions of law and a careful discussion of why the trial court had reached the decision it did. The sanction imposed is one frequently imposed under these circumstances and since defendants have failed to demonstrate why it is inappropriate, we cannot conclude that it constitutes an abuse of discretion.

III. Motion for New Trial.

[8] Defendants also contend that rather than ordering a remittitur of damages, the trial court should have granted a new trial on both liability and damages because (1) the jury’s verdict reflected a compromise on liability and damages and (2) the issues of liability and damages are intertwined. In *Handex of the Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 20, 607 S.E.2d 25, 36-37 (2005) (internal citations omitted), this Court explained:

A new trial as to damages only should be ordered if the damage issue is separate and distinct from the other issues and the new trial can be had without danger of complication with other matters in the case. It must be clear that the error in assessing damages did not affect the entire verdict. If it appears the damages awarded were from a compromise verdict, a new trial on damages alone should not be ordered.

The resolution of this issue is dictated by the standard of review. As this Court has stressed, “a trial court can exercise its discretion by granting a partial new trial solely on the issue of damages. In such an instance, the question is not whether the appellate court would have

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

ruled differently, but whether the ruling constituted a manifest abuse of discretion.” *Loy v. Martin*, 156 N.C. App. 622, 625, 577 S.E.2d 407, 409 (internal citation omitted), *disc. review denied*, 357 N.C. 251, 582 S.E.2d 274 (2003). The sole issue before this Court is, therefore, whether the trial court *abused its discretion* in denying a new trial on both liability and damages.

Defendants point to *Robertson v. Stanley*, 285 N.C. 561, 562-63, 206 S.E.2d 190, 192-93 (1974), in which the Supreme Court awarded a new trial on both liability and damages when the jury found that the defendant was negligent and the plaintiff was not contributorily negligent, but then awarded no damages. The Court explained:

“Where it appears that the verdict was the result of a compromise, such error taints the entire verdict and requires a new trial as to all of the issues in the case. If the award of damages to the plaintiff is ‘grossly inadequate,’ so as to indicate that the jury was actuated by bias or prejudice, or that the verdict was a compromise, the court must set aside the verdict in its entirety and award a new trial on all issues.”

Id. at 569, 206 S.E.2d at 195-96 (quoting 58 Am. Jur. 2d, *New Trial* § 27 (1971)).

As this Court pointed out in *Loy*, however, *Robertson*, which involved review of the denial of a motion for a new trial, does not apply when the issue is whether the trial court abused its discretion in ordering a partial new trial limited to damages. 156 N.C. App. at 625 n.1, 577 S.E.2d at 409 n.1. In any event, in this case, we fail to see how the jury’s verdict could be viewed as involving a compromise verdict. In *Robertson*, the jury’s decision to award no damages was at odds with its finding that the defendant was negligent and the plaintiff was not contributorily negligent. In this case, the jury found the existence and breach of a contract. The jury was then supposed to decide plaintiff’s damages under that contract: 20% of the profits on the projects plaintiff implemented and originated. Instead of using that measure of damages, the jury miscalculated and awarded an amount higher than what was due under the contract. No compromise between liability and damages appears.

With respect to their intertwining argument, defendants rely upon *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 292 N.C. 557, 234 S.E.2d 605 (1977), in which the Supreme Court held that the Court of Appeals erred in granting a partial new trial on damages only because

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

the issues of liability and damages were intertwined. The plaintiffs presented evidence on several different theories as to what constituted a breach of the contract, and the measure of damages could have varied according to which breach the jury found. *Id.* at 564, 234 S.E.2d at 609. Thus, a new trial on both issues was required. *Id.* at 566, 234 S.E.2d at 610.

In this case, however, plaintiff presented a single theory of breach of contract: that he was owed a bonus of 20% of the profits on properties that he originated and implemented. At trial, although defendants argued there was no contract, counsel's arguments and the evidence indicate that defendants agreed with plaintiff that if there was a contract, it was an 80/20 split of the profits, which were defined as revenues minus costs. The dispute between the parties was over what should be included within "costs."

As discussed in connection with the motion for JNOV, North Carolina courts have previously held that even if no agreement had been reached on how net income or costs would be calculated, an enforceable contract would still exist. Thus, in *Arndt*, 170 N.C. App. at 523, 613 S.E.2d at 278, the manager for a bank orally agreed with the plaintiff to pay him a bonus of 20% of all net income he earned for the bank, but the parties did not specifically agree on the formula to compute net income. Nevertheless, this Court held that the evidence of that agreement was sufficient to permit a jury to find a contract. *Id.* at 523-24, 613 S.E.2d at 279. Likewise, in *Chew*, 228 N.C. at 184, 44 S.E.2d at 871, our Supreme Court held that a contract existed based only on an agreement to pay a bonus based upon a reduction in production costs even though the agreement did not specify how production costs would be measured.

There is no question that the jury found that a contract existed, but that the verdict awarded for breach of the contract exceeded the amount supported by the evidence. While defendants have argued vigorously that the verdict suggests the jury found a different contract than that argued by the parties, we believe, given the arguments made at trial, that the trial court could have reasonably determined, as it did, that the problem with the verdict was one of calculating the damages. At a trial limited to damages, the parties would have been free to present evidence on what the profits were, including what costs should have been deducted.

In Redevelopment Comm'n of the City of Durham v. Holman, 30 N.C. App. 395, 397, 226 S.E.2d 848, 850, *disc. review denied*, 290 N.C.

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

778, 229 S.E.2d 33 (1976), this Court confirmed that “when a jury’s verdict exceeds the evidence, the decision to grant a new trial is in the discretion of the trial judge, and the appellate court will review the trial judge only if it appears he grossly abused his discretion.” In *Holman*, there was, as in this case, no dispute that the verdict exceeded the amount supported by the evidence. *Id.* The trial court allowed a motion for remittitur and denied a motion for a new trial. *Id.*, 226 S.E.2d at 849. In upholding that decision, this Court first noted that “while the verdict in the instant case exceeded competent evidence, the judgment [was] based on competent evidence.” *Id.*, 226 S.E.2d at 850. The Court then concluded that the trial court’s decision to remit the award to the highest amount supported by the evidence rather than awarding a new trial did not constitute an abuse of discretion. *Id.*

Here, the judgment is based on competent evidence, including both the jury’s finding of a breach of contract and the amount of damages ultimately awarded as a result of the remittitur. We cannot find that the trial court’s determination, after reviewing the verdict and considering counsel’s arguments, was manifestly unreasonable. Therefore, *Holman* requires that we uphold the trial court’s decision.

We also find *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 149 Ill. App. 3d 53, 501 N.E.2d 1280 (1986), *aff’d in part and rev’d in part on other grounds*, 118 Ill. 2d 306, 515 N.E.2d 61 (1987), persuasive. In *Midland*, the trial court had erred in its instruction on lost profits, and the question before the appellate courts was whether it was appropriate to order a new trial limited to damages. *Id.* at 64-65, 501 N.E.2d 1288. The court recited the following test:

A new trial solely on the issues of damages may be granted only where (1) the jury’s verdict on the question of liability is amply supported by the evidence; (2) the questions of liability and damages are so distinct that a trial limited to the question of damages is not unfair to the defendant; and (3) the damages do not appear to be the result of a compromise on the question of liability.

Id. at 65, 501 N.E.2d at 1288. After finding that the first and third elements were met, the trial court turned to the second element:

The jury’s response to the special interrogatory makes clear that it had definite views that defendant was liable for breach of contract, and we perceive no unfairness in limiting retrial to the issue of damages alone. The two questions are clearly distinct

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

in this case, as evidenced by the fact that the jury was asked to specifically consider liability in a separate interrogatory, requested by defendant, in which it did not have to address the issue of damages.

Id. at 65-66, 501 N.E.2d at 1288.

The same is true in this case. The jury's verdict sheet included six separate questions:

1. "Did the Plaintiff Timothy Kornegay and Defendant Aspen Asset Group, LLC enter into a contract?"

....

2. "Did the Defendant Aspen Asset Group, LLC breach the contract?"

....

3. "Was each of the individual Defendants an 'employer' under the North Carolina Wage and Hour Act with respect to Plaintiff Timothy Kornegay's claim for bonus compensation?"

....

4. "Did the Plaintiff originate and implement the Love property?"

....

5. "Could Defendants have sold certain properties for a profit in the exercise of reasonable care and judgment?"

....

6. "What amount is the Plaintiff entitled to recover from Defendant Aspen Asset Group, LLC for breach of contract?"

....

Thus, as in *Midland Hotel Corp.*, the issues of liability and damages were separate questions for the jury. The jury had to decide whether there was a contract and whether that contract was breached in two separate questions. Subsequently, the jury answered three separate questions relating to the calculation of damages. As in *Midland*, the jury's answers to these questions and their ultimate verdict suggests that "it had definite views" that defendants breached the contract. *Id.* We, therefore, hold that the trial court did not abuse its discretion in denying the motion for a new trial on both liability and damages.

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

Plaintiff's Cross-AppealI. Jurisdiction over Cross-Appeal.

[9] Before turning to the merits of plaintiff's cross-appeal, we must first address defendants' contention that the cross-appeal is barred by plaintiff's acceptance of the trial court's remittitur of the jury's damages award. Although the North Carolina appellate courts have not yet addressed this issue, the majority of other jurisdictions hold that a plaintiff who accepts a remittitur cannot appeal the remittitur or any issue inextricably intertwined with the remittitur. *See, e.g., Sulzer Carbomedics, Inc. v. Oregon Cardio-Devices, Inc.*, 257 F.3d 449, 460-61 (5th Cir. 2001) (holding that plaintiff could not appeal ruling on punitive damages claim because punitive damages issue was intertwined with issue of compensatory damages and plaintiff accepted remittitur of compensatory damages).

A plaintiff may, however, appeal an issue that is "separate and distinct" from those issues covered by the remittitur. *See, e.g., Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623, 626-27 (4th Cir.) (holding that although plaintiff was barred from appealing remittitur order by virtue of acceptance of remittitur, he could appeal other unrelated claims asserted below), *cert. denied*, 434 U.S. 923, 54 L. Ed. 2d 280, 98 S. Ct. 400 (1977).

Defendants argue that plaintiff's claims for liquidated damages and attorneys' fees under the NCWHA—the subject of his cross-appeal—are inextricably intertwined with the subject of the remittitur, the breach of contract claim. According to defendants, because the NCWHA expressly conditions recovery of liquidated damages and attorneys' fees on a plaintiff's establishing statutory liability for some amount of actual damages, the breach of contract claim and NCWHA claim are one and the same and liquidated damages and attorneys' fees are just an additional remedy.

We agree with plaintiff that the issues of liquidated damages and attorneys' fees are separate and distinct from the breach of contract issue. A claim under the NCWHA is a separate legal claim for relief with separate remedies. Liquidated damages and attorneys' fees are unavailable as a remedy for plaintiff's breach of contract claim, which was the claim addressed by the remittitur order. This appeal is, therefore, properly before us.

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

II. Trial Court's Denial of Liquidated Damages and Attorneys' Fees.

Turning to the merits, plaintiff first contends the trial court erred in denying his motion for liquidated damages under the NCWHA based on its finding that defendants were acting in good faith and based on reasonable grounds. N.C. Gen. Stat. § 95-25.22(a1) provides:

In addition to the amounts awarded pursuant to subsection (a) of this section, the court shall award liquidated damages in an amount equal to the amount found to be due as provided in subsection (a) of this section, provided that if the employer shows to the satisfaction of the court that the act or omission constituting the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Article, the court may, in its discretion, award no liquidated damages or may award any amount of liquidated damages not exceeding the amount found due as provided in subsection (a) of this section.

The employer bears the burden of avoiding liquidated damages by showing that it acted in good faith and with a reasonable belief that its actions were not in violation of the NCWHA. *Hamilton*, 118 N.C. App. at 15, 454 S.E.2d at 285. “When the employer cannot make such a showing, the trial court has no discretion and must award liquidated damages.” *Id.* “[E]ven if an employer shows that it acted in good faith, and with the belief that its action did not constitute a violation of the Act, the trial court may still, in its discretion, award liquidated damages in any amount up to the amount due for unpaid wages.” *Id.* We, therefore, review for abuse of discretion a trial court’s ultimate decision whether to impose liquidated damages after a showing of good faith and reasonable grounds by the defendant.

A. *Right to a Jury Trial.*

[10] As an initial matter, plaintiff argues that the issue whether defendants were acting in good faith and on reasonable grounds should have been submitted to the jury. The plain language of N.C. Gen. Stat. § 95-25.22(a1) states, however, that the employer must show “to the satisfaction of *the court*” that its actions were in good faith and based on reasonable grounds, and further provides that “*the court* may, in its discretion,” choose not to award liquidated damages. (Emphasis added.) See also *Mason v. ILS Tech., LLC*, 2007 WL 1101224, *7, 2007 U.S. Dist. LEXIS 26950, *7 (W.D.N.C. April 11, 2007) (unpublished) (holding that use of phrase “the court” in § 95-25.22(a1) indicates determination of good faith is for trial judge).

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

In accord with this language, the North Carolina appellate courts have consistently assumed that the trial judge is the one to decide the question of good faith and reasonable grounds under the NCWHA. *See Luke v. Omega Consulting Group, LC*, 194 N.C. App. 745, 752, 670 S.E.2d 604, 610 (2009) (“The trial court is only permitted to reduce the award of liquidated damages if ‘the employer had reasonable grounds for believing that the act or omission was not a violation of this Article’ ” (quoting N.C. Gen. Stat. § 95-25.22(a1))); *Arndt*, 170 N.C. App. at 531-32, 613 S.E.2d at 283 (holding that even though record contained evidence that employer was acting in good faith and on reasonable grounds, trial judge’s decision to award liquidated damages on defendants was not manifestly unsupported by reason).

[11] Plaintiff asserts that the failure to submit the issue of defendants’ good faith and reasonable grounds to the jury was a violation of his constitutional right to a jury trial in “all actions respecting property.” Although this constitutional right is limited to claims that existed at the time the state constitution was adopted in 1868, if a statutory claim parallels a claim available in the common law at that time, it also carries with it a right to a jury trial. *Kiser v. Kiser*, 325 N.C. 502, 510, 385 S.E.2d 487, 491 (1989).

In *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 177-78, 594 S.E.2d 1, 13 (2004), the Supreme Court held that a plaintiff does not have a property right in punitive damages for purposes of the constitutional right to a jury trial. Similarly, this Court has held that there is no constitutional right to a jury trial on the question of Rule 11 sanctions. *See Hill v. Hill*, 181 N.C. App. 69, 73-74, 638 S.E.2d 601, 604-05, *appeal dismissed and disc. review denied*, 361 N.C. 427, 648 S.E.2d 502-03 (2007), *cert. denied*, 555 U.S. 1052, 172 L. Ed. 2d 620, 129 S. Ct. 633 (2008). We see no basis for distinguishing between punitive damages and Rule 11 sanctions, on the one hand, and liquidated damages under the NCWHA on the other. *Cf. Hamilton*, 118 N.C. App. at 16, 454 S.E.2d at 286 (holding liquidated damages are not compensatory damages).

Plaintiff relies on *Overcash v. Blue Cross & Blue Shield of N.C.*, 94 N.C. App. 602, 614-15, 381 S.E.2d 330, 338-39 (1989), in which this Court held that the right to a jury trial extends to ERISA actions brought in North Carolina courts even if a jury trial would not be granted in federal court. In *Overcash*, the Court reasoned that although it was an ERISA claim, “the right to benefits under the plan is a matter of contract and, prior to the enactment of ERISA, courts

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

would review the denial of benefits in the same manner as any other contract claim.” *Id.* at 614, 381 S.E.2d at 338. Plaintiff contends “the cause of action under the Wage and Hour Act for unpaid wages parallels a common law contract claim.” While this Court’s decision in *Overcash* might be relevant to a discussion of whether there is a right to a jury trial on an employer’s liability for compensatory damages under the NCWHA, as that claim parallels a breach of contract claim, here we are concerned with plaintiff’s claim for *liquidated damages*, a claim more analogous to punitive damages as to which no jury trial attaches. The liquidated damages issue was, therefore, properly decided by the trial court.

B. Waiver.

[12] Plaintiff also argues that the trial court should have awarded liquidated damages because defendants waived the good faith and reasonable grounds defense by failing to plead it or request its submission to the jury. We need not address the issue of waiver, however, because we have concluded, based on the record, that plaintiff impliedly consented to trial of the issue. *See N.C. State Bar v. Gilbert*, 189 N.C. App. 320, 324, 663 S.E.2d 1, 4 (“Under the doctrine of implied consent, plaintiff’s failure to plead an affirmative defense does not result in waiver where some evidence is introduced at trial pertinent to the elements of the affirmative defense.”), *disc. review denied*, 362 N.C. 682, 670 S.E.2d 234 (2008).

C. Sufficiency of Trial Court’s Order.

[13] Plaintiff next challenges the merits of the trial court’s decision not to award liquidated damages. In declining to impose liquidated damages, the trial court made the following findings:

5. On the issue of liquidated damages, the Court finds, by the greater weight of the evidence, that Defendants acted in good faith in discharging their obligations under the Wage and Hour Act and had a reasonable basis for believing that their failure and refusal to pay bonuses to Plaintiff was not in violation of the Act.

6. The facts of this case were unusual to say the least. The jury was required to sort through substantial disputes as to, among other things, (1) the very existence of an agreement between the parties to pay bonuses; (2) the scope of any such bonus agreement; (3) the dates when bonus payments accrued; and (4) the costs to be offset against any bonus payments. As a

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

result, the Court finds specifically that Defendants had reasonable grounds for defending against Plaintiff's claims and acted in good faith with respect to their obligations under the Act.

7. The Court also declines to exercise its discretion under the Act to award liquidated damages.

The North Carolina appellate courts have yet to address the proper standard of review for a trial court's underlying determinations of good faith and reasonableness under the NCWHA. Several appellate courts have, however, discussed the standard of review with respect to nearly identical language in the Fair Labor Standards Act ("FLSA").² In *Laborers' Int'l Union of N. Am., AFL-CIO v. Case Farms, Inc.*, 127 N.C. App. 312, 314, 488 S.E.2d 632, 634 (1997), this Court noted that "[t]he North Carolina Wage and Hour Act is modeled after the Fair Labor Standards Act (FLSA)" and explained that opinions construing the FLSA are, therefore, helpful in interpreting the NCWHA.

In *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 908 (3d Cir. 1991) (internal citation omitted), *cert. denied*, 503 U.S. 936, 117 L. Ed. 2d 617, 112 S. Ct. 1473 (1992), the Third Circuit held:

Assuming a district court has first properly made the required preliminary findings of an employer's subjective good faith and objectively reasonable grounds for violating the Act, we will review its exercise of "substantial discretion" to deny or limit an award of liquidated damages only for abuse of discretion. Furthermore, while we must apply the clearly erroneous standard of Fed.R.Civ.P. 52(a) when reviewing both the district court's historical findings of fact which underlie its "good faith" and "reasonableness" determinations, and the finding of subjective good faith itself, we exercise plenary review of the district court's legal conclusion that Cooper had "reasonable grounds for believing" that its violative conduct was not a violation of the FLSA.

See also Air Logistics of Alaska, Inc. v. Throop, 181 P.3d 1084, 1097 (Alaska 2008) ("The question of whether an employer has shown good faith and reasonableness by clear and convincing evidence is a mixed question of law and fact. Therefore, factual findings will be

2. 29 U.S.C. § 260 provides that in any action to recover unpaid wages under the FLSA, the trial court may, in its discretion, decline to impose liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation" of the Act.

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

overturned only if they are clearly erroneous, but an application of the law to established facts will be reviewed de novo. Once it is established that the superior court did not err in finding clear and convincing evidence of good faith and reasonableness, the superior court's decision regarding whether or not to award any level of liquidated damages is reviewed for abuse of discretion.”); *Tefft v. State*, 271 Mont. 82, 91-92, 894 P.2d 317, 323 (1995) (“What constitutes good faith and reasonable grounds, as those notions relate to the issue of liquidated damages, involves mixed questions of law and fact. To the extent that legal principles are involved, the standard of review is de novo, but to the extent that factual issues are involved, we will reverse the district court only for clear error.”).

In essence, these courts have held that the traditional standard of review that applies to a trial court's factual findings—in federal court, the “clearly erroneous” standard and in North Carolina, the “competent evidence” standard—applies to findings of fact made by a trial court in addressing a claim for liquidated damages. In reviewing the trial court's conclusions of law, the courts have held that review is de novo, including on the issue whether the findings of fact support the conclusions of law.

We note that this standard of review is identical to the standard of review used by the North Carolina appellate courts in reviewing orders imposing Rule 11 sanctions, which also involve a mixture of issues of fact and issues of law. *See Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989) (in reviewing trial court's decision to impose Rule 11 sanctions, “the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence”). We, therefore, adopt and apply the standard of review applied by the above courts when considering the FLSA.

In contrast to many NCWHA cases, this case does not involve an employer's general policy or plan, but rather hinges entirely on the legal effect of initial negotiations between plaintiff and Steve Clardy. If there were no enforceable contract regarding payment of a bonus, then defendants would have no obligations under the NCWHA with respect to a bonus. As the trial court found, evidence was presented by both sides regarding whether any contract existed at all as to bonuses, what properties could give rise to a bonus, the precise means of calculating the bonuses, and when the bonuses were due to

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

be paid. Even though the jury ultimately did not agree that no contract existed, the record contains sufficient evidence that defendants genuinely believed that there was no contract to support the trial court's finding that defendants were acting in good faith. Plaintiff, of course, presented evidence countering that showing, but, under the applicable standard of review, we must uphold the trial court's finding of good faith.

Plaintiff urges that there can be no finding of good faith because defendants presented no evidence that they ever considered the requirements of the NCWHA or that they attempted to ascertain their obligations under the Act. The evidence presented by defendants at trial, however, was that defendants believed there was no agreement at all to pay plaintiff 20% of the profits. Therefore, they would have no reason to investigate the requirements of the NCWHA. The trial court's finding of good faith is, therefore, supported by competent evidence and is binding on appeal.

With respect to whether defendants had a reasonable basis for believing their failure to pay bonuses to plaintiff was not in violation of the NCWHA, we adopt the rule applied in the majority of jurisdictions with respect to the FLSA and use an objective standard. *See, e.g., Chao v. Barbeque Ventures, LLC*, 547 F.3d 938, 942 (8th Cir. 2008) (“To avoid a liquidated damages award . . . the employer must also prove its position was objectively reasonable.” (quoting *Hultgren v. County of Lancaster*, 913 F.2d 498, 509 (8th Cir. 1990))); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 910 (9th Cir. 2003) (“To satisfy § 260, a FLSA-liable employer bears the ‘difficult’ burden of proving both subjective good faith and objective reasonableness, ‘with double damages being the norm and single damages the exception.’” (quoting *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir. 1999))), *aff’d*, 546 U.S. 21, 163 L. Ed. 2d 288, 126 S. Ct. 514 (2005).

We agree with the trial court that, given the evidence at trial, a reasonable employer could have believed that no contract regarding payment of a bonus arose and, therefore, defendants were not obligated under the NCWHA to pay plaintiff a bonus. Plaintiff's arguments require that we adopt his construction of the evidence—in essence, he argues that he was entitled to a directed verdict or JNOV as to the existence of a contract. The trial court, however, denied plaintiff's directed verdict and JNOV motions, and plaintiff has not sought review of those decisions. We see no basis for concluding on appeal, solely for purposes of the liquidated damages issue, that the evidence

KORNEGAY v. ASPEN ASSET GRP., LLC

[204 N.C. App. 213 (2010)]

was undisputed that the parties entered into an enforceable contract for the payment of bonuses.

[14] Finally, plaintiff contends that the trial court's findings of fact are not sufficiently specific. In order to ensure meaningful review on appeal, "[t]he trial court must . . . make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005). Although the findings of fact could have been more precise, we hold that they were adequate to set out the factual basis for the trial court's conclusions and to explain its rationale for deciding not to exercise its discretion to award liquidated damages. As plaintiff makes no serious argument as to how the trial court's ultimate decision not to impose liquidated damages was an abuse of discretion, we affirm the liquidated damages decision.

D. Attorneys' Fees.

[15] Plaintiff also challenges the trial court's denial of his motion for attorneys' fees. A trial court's decision whether or not to award attorneys' fees under N.C. Gen. Stat. § 95-25.22(d) is reviewed for abuse of discretion. *See Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 358, 416 S.E.2d 166, 172 (1992) ("Plaintiffs, in the discretion of the court, also could have recovered reasonable attorneys' fees [under the NCWHA]."); *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 435, 531 S.E.2d 476, 482 (2000) ("Thus where, as here the [NCWHA] applies, the court in its discretion may award plaintiff attorney's fees.").

Although plaintiff argues that the trial court failed to make adequate findings of fact to support its denial of his motion for attorneys' fees, our review of the order leads us to conclude that the findings of fact relied upon in denying the request for liquidated damages also were the basis for the denial of attorneys' fees. We do not believe that the trial court's denial of attorneys' fees because of the substantial dispute in the evidence was manifestly unreasonable. Accordingly, we also affirm the denial of attorneys' fees.

No error.

Judges ROBERT C. HUNTER and STEELMAN concur.

STATE v. PETTIGREW

[204 N.C. App. 248 (2010)]

STATE OF NORTH CAROLINA v. KERRY JARROD PETTIGREW

No. COA09-1226

(Filed 1 June 2010)

1. Sexual Offenses— sufficient evidence—bill of particulars

The trial court did not err in denying defendant's motion to dismiss charges of first-degree sexual offense because there was substantial evidence that the victim was abused within the time period alleged in the bill of particulars.

2. Jurisdiction— subject matter—defendant able to be tried as an adult

The trial court had subject matter jurisdiction over a sexual offenses case because defendant was 16 years old during the period of time that the superseding indictment alleged that defendant committed the charged offenses.

3. Sentencing— not cruel and unusual punishment

Defendant's sentence of 32 to 40 years in prison for his conviction of two counts of first-degree sexual offense against his half-brother was not cruel and unusual punishment in light of the Supreme Court's decision in *State v. Green*, 348 N.C. 588.

Appeal by Defendant from judgments and commitments entered 26 March 2009 by Judge Lindsay R. Davis, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 8 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General Jane Rankin Thompson, for the State.

Michael E. Casterline for Defendant-Appellant.

STEPHENS, Judge.

On 25 March 2009, a jury found Defendant guilty of two counts of first degree sexual offense and not guilty of taking indecent liberties with a child. On 26 March 2009, the trial court entered judgments corresponding to the jury's verdict and sentenced Defendant to consecutive terms of 192 to 240 months imprisonment.¹ The evidence presented at trial tended to show the following:

1. Defendant's sentence equates to a term of 32 to 40 years imprisonment.

STATE v. PETTIGREW

[204 N.C. App. 248 (2010)]

Defendant was born on 23 January 1985, and his half brother, K.P.,² was born on 21 November 1990. Defendant and K.P. have the same father. When Defendant was nine years old, he began living with his father in Winston-Salem, North Carolina. At that time, K.P. resided permanently with his mother, but he stayed at his father's home two to three times per week, where he and Defendant would share a bedroom.

K.P. testified that when he was five years old and Defendant was 11 years old, Defendant began abusing him. The abuse began one night when Defendant and K.P. had gone to bed, and Defendant exposed his penis to K.P. On another occasion when K.P. was spending the night at his father's, Defendant again exposed his penis and asked K.P. to "masturbate him[,] by saying, " 'Put your hand around this and do this for me.' " K.P. testified that

[o]ver a period of time, you know, the small instances of me just masturbating him continued in the bedroom or in the living room. It was wherever the two of us happened to be at the moment with no one around. One instance, he—after I had masturbated him for a while, he then asked me to lick his butt.

K.P. stated that he complied with Defendant's request to "lick his butt." K.P. could not recall exactly when this incident occurred, but stated that he may have been older than five years old at that time.

On another occasion, Defendant asked K.P. to perform oral sex on him, and K.P. complied. K.P. described the manner in which each encounter typically transpired as follows:

[Defendant] would ask me to masturbate him and then he would—(pause)—he wouldn't force me to do anything. He would not force me. And he would ask me to masturbate him and then he would be like, "Okay. If you love me, you will go ahead and you will lick my butt," or then as it graduated, he would say, "Okay. Suck my dick."

When K.P. was six years old, Defendant performed anal sex on K.P. On that instance, instead of telling K.P. that "[i]f you love me, you would do this[,] Defendant "was a little more violent." Defendant told K.P. to take off his clothes, but K.P. did not comply. Thereafter, "[Defendant] took off [K.P.'s] clothes, piece by piece. And after that, [K.P.] performed oral sex on [Defendant]; and then after that, [Defendant] performed anal sex on [K.P.]"

2. We use Defendant's half-brother's initials to protect his privacy.

STATE v. PETTIGREW

[204 N.C. App. 248 (2010)]

When K.P. was seven years old and Defendant was 12 years old, the brothers' father, stepmother, half sister, and Defendant moved into a new house in Winston-Salem. Before the move, Defendant would appeal to K.P.'s "sense of wanting to be the good little brother[.]" by saying, "'Come help big brother out.'" After the move, Defendant's abuse of K.P. continued, but Defendant "became more violent[.]" and Defendant "would be forceful." On one occasion, Defendant grabbed K.P.'s arm, threatened to kill K.P. if he told anyone about what was happening, and told K.P. to remove his clothes. Defendant laid on the bed and ordered K.P. to "lick his butt" and perform oral sex on him, and then Defendant performed anal sex on K.P. K.P. testified that this sequence of events occurred approximately 30 to 35 times after Defendant and his father moved into the new house.

K.P. could not recall exactly when the last incident of abuse occurred, but he remembered that it was sometime prior to an altercation in the summer of 2001 between K.P. and Defendant. During that incident, Defendant had taken K.P.'s bicycle out all day without K.P.'s permission. When Defendant came home with K.P.'s bicycle, K.P. was upset and asked where Defendant had been and why Defendant did not ask permission to use the bicycle. This angered Defendant and he told K.P. to "[g]o upstairs." K.P. asked, "Why?" and Defendant responded, "You know for what." K.P. refused to go upstairs

[a]nd [Defendant] went back into the kitchen and he grabbed a knife and I ran out of the house and got on my bike, which was on the front porch at the time, and rode to one of my friends [sic] from school, his house, who lived up the street. And [Defendant] chased me out the house with the knife and partially down the street until [Defendant] couldn't keep up with me. And from there, when I arrived, I was crying. I was really upset. And when I arrived, they called my parents. . . . They called my parents and one of my parents called the police and the police came.

K.P. did not tell the police or his parents about the sexual abuse at that time. Defendant's abuse of K.P. had been ongoing up until this point, but the abuse did not occur again after this incident.

In April 2007, K.P. learned that Defendant planned to marry his girlfriend, who had three young children. At that time, K.P. told his parents that Defendant had "molested" him over the course of five years. K.P. decided to tell his parents at that time because he "was

STATE v. PETTIGREW

[204 N.C. App. 248 (2010)]

just concerned because [he] didn't want [the abuse] to happen to anyone else." K.P. waited until September 2007 to tell the police about the abuse because he "was afraid for [his] safety."

K.P.'s father testified that in April 2007, K.P. told him that Defendant had "continuously molested" K.P. from the time K.P. was five until K.P. was 11 or 12 years old. Defendant's father confronted Defendant about K.P.'s allegations about a week later, and Defendant "denied it vehemently[.]" Defendant's father also testified that he recalled the incident where law enforcement officials were called due to reports that Defendant had chased K.P. down the street with a knife.

Detective T.G. Porter ("Detective Porter") of the Winston-Salem Police Department spoke with K.P. and his father on 11 September 2007. K.P. told Detective Porter that Defendant had sexually abused him from the time K.P. was five years old until he was 13 years old. Detective Porter referred the case to the criminal investigations division.

Detective Kelly Wilkinson ("Detective Wilkinson") of the Winston-Salem Police Department's criminal investigations division testified that she interviewed K.P. on 13 September 2007. K.P. told Detective Wilkinson essentially the same story to which he testified at trial. K.P. told Detective Wilkinson that Defendant's sexual abuse stopped when K.P. was in the seventh grade. Detective Wilkinson also spoke to Defendant, and Defendant denied sexually abusing K.P. Detective Wilkinson confirmed that the altercation between Defendant and K.P. involving the knife occurred on 6 August 2001.

At the close of the State's evidence, Defendant made a motion to dismiss because the evidence was insufficient to show that the abuse occurred during the time frame stated in the bill of particulars, 1 February 2001 through 20 November 2001. Defendant's motion was denied. Defendant did not present any evidence. Defendant renewed his motion to dismiss, and this motion was denied. The jury found Defendant guilty of two counts of first degree sexual offense and not guilty of taking indecent liberties with a child. Defendant appeals.

*Discussion**A. Sufficiency of the Evidence*

[1] In his first argument, Defendant argues that there was insufficient evidence to support his conviction because there is no evidence

STATE v. PETTIGREW

[204 N.C. App. 248 (2010)]

that the abuse occurred during the time frame alleged in the bill of particulars. We disagree.

On appeal of a trial court's denial of a motion to dismiss for insufficient evidence, this Court considers "whether substantial evidence exists as to each essential element of the offense charged and of the defendant being the perpetrator of that offense." *State v. Glover*, 156 N.C. App. 139, 142, 575 S.E.2d 835, 837 (2003) (citing *State v. Barden*, 356 N.C. 316, 351, 572 S.E.2d 108, 131 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003)). "The existence of substantial evidence is a question of law for the trial court, which must determine whether there is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Barden*, 356 N.C. at 351, 572 S.E.2d at 131). In determining the existence of substantial evidence, "[t]he court must 'consider the evidence in the light most favorable to the State, take it to be true, and give the State the benefit of every reasonable inference to be drawn therefrom.'" *Id.* (quoting *State v. Martin*, 309 N.C. 465, 480, 308 S.E.2d 277, 286 (1983)).

The superseding indictment in this matter was filed on 10 March 2008 and states that the alleged offenses occurred on or about 1 February 2001 through 20 November 2001. Pursuant to N.C. Gen. Stat. § 15A-924(a)(4), "an indictment must allege the date or the period of time during which the offense was committed." *State v. Burton*, 114 N.C. App. 610, 612, 442 S.E.2d 384, 385 (1994). Section 15A-924(a)(4) provides that

[a] criminal pleading must contain . . . [a] statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time. Error as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice.

N.C. Gen. Stat. § 15A-924(a)(4) (2008).

On 30 January 2009, defense counsel filed a motion for a bill of particulars. *See* N.C. Gen. Stat. § 15A-925(a) (2009) ("Upon motion of a defendant under G.S. 15A-952, the court in which a charge is pending may order the State to file a bill of particulars with the court and to serve a copy upon the defendant."). On 11 March 2009, the State filed a bill of particulars, which stated in part that

STATE v. PETTIGREW

[204 N.C. App. 248 (2010)]

this case involves a teenage child of age 18 (eighteen) years of age and the victim shall be testifying about a ten year time span; therefore, times, dates, and locations cannot be as exact as when dealing with adult victims. Moreover, the State has provided the defendant with open discovery regarding the above-cited cases. However, in view of the foregoing, the State, being as specific as possible, makes the following answer:

1. The date of the alleged offenses occurred on or about February 1, 2001 through November 20, 2001.

Pursuant to section 15A-925(e), “[t]he evidence of the State, as to those matters within the scope of the motion, is limited to the items set out in the bill of particulars.” N.C. Gen. Stat. § 15A-925(e) (2009).

“However, it is well established that variance between allegation and proof as to time is not material where no statute of limitations is involved.” *Burton*, 114 N.C. App. at 612, 442 S.E.2d at 385 (internal citations and quotation marks omitted). “[T]he date given in the bill of indictment is not an essential element of the crime charged and the fact that the crime was in fact committed on some other date is not fatal.” *Id.* (quoting *State v. Norris*, 101 N.C. App. 144, 151, 398 S.E.2d 652, 656 (1990), *disc. review denied*, 328 N.C. 335, 402 S.E.2d 843 (1991)).

In cases involving allegations of child sex abuse, temporal specificity requirements are further diminished. *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991). Children frequently cannot recall exact times and dates; accordingly, a child’s uncertainty as to the time of the offense goes only to the weight to be given that child’s testimony. *Id.* Judicial tolerance of variance between the dates alleged and the dates proved has particular applicability where, as in the case *sub judice*, the allegations concern instances of child sex abuse occurring *years before*. See *State v. Norris*, 101 N.C. App. at 150-51, 398 S.E.2d at 656. Unless a defendant demonstrates that he was deprived of the opportunity to present an adequate defense due to the temporal variance, the policy of leniency governs. *State v. Young*, 103 N.C. App. 415, 420, 406 S.E.2d 3, 6, *disc. review denied*, 330 N.C. 201, 412 S.E.2d 65 (1991); [*State v. Riggs*, 100 N.C. App. 149, 152, 394 S.E.2d 670, 672 (1990)]; see also G.S. § 15A-924(a)(4) (“Error as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with

STATE v. PETTIGREW

[204 N.C. App. 248 (2010)]

respect to the charge and the error or omission did not mislead the defendant to his prejudice.”).

Burton, 114 N.C. App. at 613, 442 S.E.2d at 386.

In *Burton*, where the defendant was convicted of taking indecent liberties with a child and incest, *inter alia*, our Court held that no fatal variance existed between the time periods stated in the four challenged indictments and the evidence presented at trial. *Id.* at 614, 442 S.E.2d at 386. For example, two of the indictments in *Burton* alleged that the defendant committed incest in September 1976 and March 1977. *Id.* at 613, 442 S.E.2d at 386. The victim testified that only one instance of sexual intercourse occurred when she was 13 years old, which was at least one month before September 1976 and at least seven months before March 1977. *Id.* The victim testified that she and the defendant engaged in sexual intercourse “two or three times a week” from age thirteen until her high school years.” *Id.* Based on this evidence “and in light of the policy of leniency applicable to temporal discrepancies in child sex abuse indictments,” we held that no fatal variance existed as to the challenged offenses. *Id.* at 614, 442 S.E.2d at 386. We further noted that the defendant “suffered no prejudice as his defense was based upon denial of the charges rather than alibi during the time frames set out in the indictments.” *Id.*

In the present case, the evidence tended to show that Defendant sexually abused K.P. from the time K.P. was five years old until he was ten years old. K.P. was born on 21 November 1990, and thus, was ten years old during the entire time period set out in the superseding indictment and bill of particulars. K.P. testified that his father moved to a new house when he was seven years old and that Defendant abused him the majority of the times K.P. visited his father at the new house. Defendant engaged in oral and anal sex with K.P. when K.P. was “eight, nine, 10” years old. Although K.P. could not recall the exact date of the last time he had sexual contact with Defendant, K.P. said that he “would have been 10 at the time” and testified that the abuse had been ongoing up until the incident in August 2001 involving the bicycle and a knife.

During direct examination of K.P., the State asked K.P. how old he was when Defendant stopped abusing him. K.P. answered, “I would have been 10.” During his testimony, K.P. asserted three times that he was ten years old when the abuse finally stopped. When asked how he remembered how old he was when the abuse finally stopped, K.P. testified that

STATE v. PETTIGREW

[204 N.C. App. 248 (2010)]

[t]here was an altercation between my brother and I one summer at the Williamsburg address concerning the fact that he had taken my bike out all day and my father was out of the house. He had taken my bike out all day and I was at home. And he came home with my bike. I was upset because it was my property. And when he came in, I asked him where he had been because everybody was, you know, wondering where he was, and I asked him why he didn't ask my permission to take my bike and he got angry. And he went into the kitchen to do something—I think it was to make a sandwich, and came back out and he was like, you know, "Go upstairs."

And I was like, "Why?"

And he's like, "You know for what."

And I was like, "No."

. . . .

[THE STATE:] So nothing happened as far as the sex on that day?

[K.P.:] Right.

[THE STATE:] That was the day you finally said no?

[K.P.:] Yes.

K.P. also testified that Defendant was 16 years old at the time of the last incident.

[THE STATE:] So how old were you prior to the last incident where you told him, no, you weren't going to do? How old were you at that time?

[DEFENSE COUNSEL:] Objection. Asked and answered.

[THE COURT:] Well, I think he's already testified how old he was at the last incident.

[THE STATE:] How old was Kerry?

[K.P.:] Kerry would have been—(pause)—Kerry would have been 16.

[THE STATE:] All right. So the incident you just talked about with the—in the living room with the oral and the anal sex, how old were you at the Williamsburg address when that would occur?

[K.P.:] Eight, nine, 10. It would be random.

STATE v. PETTIGREW

[204 N.C. App. 248 (2010)]

K.P.'s testimony regarding what he told Detective Wilkinson provides further support for the inference that Defendant's abuse was ongoing up until the incident with the knife in the summer of 2001. When asked what he told Detective Wilkinson, K.P. replied, "I told the detective much of what I spoke of today. About the instances of the sexual abuse and when it finally came to an end, the situation with the knife." On cross-examination, defense counsel asked K.P., "And you were very clear today that that instance about the bike is when [the abuse] all ended, right?" K.P. answered, "Yes." Accordingly, there was substantial evidence that Defendant abused K.P. up until August 2001, which was well within the time period alleged in the bill of particulars.

We note that unlike in *Burton* where the time frames alleged in the indictments were inconsequential, the time frame in which the abuse occurred in the present case is important. Defendant was born on 23 January 1985. The superseding indictment and bill of particulars allege that Defendant committed the charged offenses between 1 February 2001 and 20 November 2001, when he was sixteen years old, which would allow the State to prosecute Defendant as an adult. *See* N.C. Gen. Stat. § 7B-1604(a) (2009) ("Any juvenile . . . who commits a criminal offense on or after the juvenile's sixteenth birthday is subject to prosecution as an adult."). Nevertheless, unless Defendant "demonstrates that he was deprived of the opportunity to present an adequate defense due to the temporal variance, the policy of leniency [in cases involving child sexual abuse] governs." *Burton*, 114 N.C. App. at 613, 442 S.E.2d at 386. Here, Defendant argues only that the evidence was insufficient to show that Defendant engaged in sexual acts with K.P. during the time period specified in the bill of particulars. Viewed in the light most favorable to the State, however, K.P.'s testimony sufficiently establishes that Defendant continued to abuse K.P. during the time period charged.

Accordingly, based on the foregoing evidence "and in light of the policy of leniency applicable to temporal discrepancies in child sex abuse indictments," *id.* at 614, 442 S.E.2d at 386, we hold there was substantial evidence that Defendant abused K.P. within the alleged time period and the trial court thus properly denied Defendant's motion to dismiss. Defendant's argument and the assignments of error upon which it is based are overruled.

B. Superior Court's Jurisdiction

[2] Defendant next argues that his convictions must be vacated because the time period of the offenses alleged in the superseding

STATE v. PETTIGREW

[204 N.C. App. 248 (2010)]

indictment encompasses a time prior to Defendant's 16th birthday, and thus, the superior court lacked jurisdiction over this matter.³ We disagree.

"[W]hether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal de novo." *State v. Black*, — N.C. App. —, —, 677 S.E.2d 199, 202 (2009) (internal citation and quotation marks omitted). "Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to demur or object to the jurisdiction is immaterial." *Stark v. Ratashara*, 177 N.C. App. 449, 451-52, 628 S.E.2d 471, 473 (2006).

The district court "has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent. For purposes of determining jurisdiction, the age of the juvenile at the time of the alleged offense governs." N.C. Gen. Stat. § 7B-1601(a) (2009). If, however, a juvenile commits a criminal offense on or after the juvenile's 16th birthday, the juvenile is subject to prosecution as an adult in superior court. *See* N.C. Gen. Stat. § 7B-1604 (2009).

As stated *supra*, the superseding indictment alleged that Defendant committed the charged offenses "on or about" 1 February 2001 through 20 November 2001. On 23 January 2001, Defendant turned 16 years old. Thus, Defendant contends that the "on or about" language in the superseding indictment could encompass acts committed before 23 January 2001, when Defendant was 15 years old.

N.C. Gen. Stat. § 15A-924(a)(4) provides that an indictment must include "[a] statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time." The "on or about" language is commonly used in indictments, and Defendant acknowledges that this language is usually sufficient for purposes of N.C. Gen. Stat. § 15A-924(a)(4).

We are not persuaded by Defendant's argument. As we held above, there was substantial evidence that Defendant committed the charged offenses *within* the time frame alleged in the superseding indictment. Defendant was 16 years old during that entire time frame.

3. Defendant failed to assign this argument as error in the record on appeal. On 7 December 2009, Defendant made a motion to this Court to allow amendment of the record on appeal to include this additional assignment of error. Our Court allowed Defendant's motion on 22 December 2009, and thus, Defendant's argument is properly before us for review.

STATE v. PETTIGREW

[204 N.C. App. 248 (2010)]

Accordingly, Defendant's argument is without merit, and this assignment of error is overruled.

C. Cruel and Unusual Punishment

[3] In his final argument, Defendant contends that his sentence of 32 to 40 years imprisonment violates the United States and North Carolina constitutional prohibitions against cruel and unusual punishment because of his young age when he committed the offenses. The State argues that Defendant has not preserved this issue for appellate review because Defendant did not raise this constitutional issue at trial. *See State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (“[C]onstitutional matters that are not raised and passed upon at trial will not be reviewed for the first time on appeal.” (Internal citations and quotation marks omitted)). However, in *State v. Curmon*, 171 N.C. App. 697, 615 S.E.2d 417 (2005), our Court held that “[a]n error at sentencing is not considered an error at trial for the purpose of Rule 10(b)(1) because this rule is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal.” *Id.* at 703, 615 S.E.2d at 422 (internal citation and quotation marks omitted). Accordingly, Defendant was not required to object at sentencing to preserve this issue on appeal. *Id.* at 704, 615 S.E.2d at 422-23.

The Eighth Amendment to the United States Constitution states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII. Similarly, Article I, Section 27 of the North Carolina Constitution prohibits the infliction of “cruel *or* unusual punishments.” N.C. Const. art. I, § 27 (emphasis added). Historically, our courts have “analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions.” *State v. Green*, 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998).

In *Green*, the defendant argued “that committing a thirteen-year-old defendant to a term of life imprisonment for first-degree sexual offense constitute[d] cruel and unusual punishment for purposes of the Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 27 of the North Carolina Constitution.” *Id.* at 602, 502 S.E.2d at 827-28. Our Supreme Court disagreed and upheld the defendant's sentence, holding that “sentencing a thirteen-year-old defendant to mandatory life imprisonment for commission of a first-degree sexual offense is within the bounds of

STATE v. JOHNSON

[204 N.C. App. 259 (2010)]

society's current and evolving standards of decency." *Id.* at 608, 502 S.E.2d at 831.

Here, Defendant acknowledges our Supreme Court's holding in *Green* but urges this Court to reconsider this issue in light of the United States Supreme Court's holding in *Roper v. Simmons*, 543 U.S. 551, 161 L. Ed. 2d 1 (2005). In *Roper*, the Court held that the characteristics of juvenile offenders such as their diminished culpability and their capacity for change rendered the death penalty unconstitutional as applied to offenders who committed their offenses before the age of 18 years old, even though the death penalty is otherwise constitutional when applied to adult offenders. *Id.* at 573-74, 161 L. Ed. 2d at 24-25. Contrary to Defendant's contention, the decision in *Roper* does not distinguish our Supreme Court's holding in *Green*. In *Roper*, the Court considered only the imposition of the death penalty for juvenile offenders and did not consider either life imprisonment or any other term of imprisonment of juveniles.

In the present case, Defendant was 16 years old when he committed the sexual offenses for which he was sentenced to 32 to 40 years imprisonment. In light of the decision in *Green*, in which a term of life imprisonment for a 13-year-old sexual offender was held not to be "grossly disproportionate" and not in violation of the constitutional prohibitions against cruel and unusual punishments, we uphold Defendant's sentence. *Green*, 348 N.C. at 609, 502 S.E.2d at 832.

NO ERROR.

Chief Judge MARTIN and Judge WYNN concur.

STATE OF NORTH CAROLINA v. KELVIN JAMES JOHNSON

No. COA09-908

(Filed 1 June 2010)

**Search and Seizure— motion to suppress—anonymous tip—
insufficient indicia of reliability**

The trial court erred in denying defendant's motion to suppress evidence seized in connection with his detention and the search of his vehicle. The anonymous tip by which officers justified the warrantless stop of defendant's car did not contain suffi-

STATE v. JOHNSON

[204 N.C. App. 259 (2010)]

cient indicia of reliability. Moreover, *Arizona v. Gant*, 556 U.S. —, applies retroactively and the search of defendant's car following his arrest for driving with a suspended license was unconstitutional.

Appeal by defendant from judgment entered 29 September 2008 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 12 January 2010.

Attorney General Roy Cooper, by Assistant Attorney General Scott Stroud, for the State.

Michele Goldman for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Kelvin James Johnson ("defendant") appeals the denial of his motion to suppress evidence seized in connection with his detention and the search of his vehicle. After denial of said motion, defendant pled guilty to (1) possession of a firearm by a felon, (2) two counts of possession of a stolen firearm, (3) one count of carrying a concealed weapon, and (4) one count of driving while license revoked. Defendant also admitted to attaining habitual felon status. The trial court consolidated defendant's convictions and sentenced him as a Class C, Level IV offender.

After review, we conclude that the trial court erred when it held, as a matter of law, that the anonymous tip possessed sufficient indicia of reliability to justify the officers' warrantless stop of defendant's car. Moreover, because *Arizona v. Gant*, 556 U.S. —, 173 L. Ed. 2d 485 (2009), applies retroactively, we conclude that the warrantless search of the defendant's car following his arrest for driving with a suspended license was unconstitutional. As such, we hold that defendant's motion to suppress was improperly denied, and all the State's evidence of contraband and weapons should have been suppressed.

I. FACTUAL BACKGROUND

At trial, the State's evidence showed the following: On 19 September 2007, Sergeant Osborne and Officer Dickerson were working for the Winston-Salem Police Department. They were riding together and assisting Officer Navy who had been assigned to respond to an anonymous tip that dispatch received at 12:14 p.m. that day. The anonymous tipster reported that a black male wearing a white t-shirt and blue shorts was selling illegal narcotics and guns at the corner of

STATE v. JOHNSON

[204 N.C. App. 259 (2010)]

Pitts and Birch Streets in the Happy Hill Garden housing community. The caller said the sales were occurring out of a blue Mitsubishi, with a license plate of WT 3456. The caller refused to provide a name and the police had no means of tracking him or her down. The officers did not know how the caller obtained his or her information.

Prior to the officers' arrival in the Happy Hill neighborhood, the anonymous tipster called back at 12:32 p.m. and stated that the suspect had just left the area, but would return shortly. Due to building construction, the Happy Hill neighborhood had only two entrance points—The Mock Street Bridge, and the Alder Street exit. Osborne and Dickerson stationed themselves near the Mock Street entrance while Navy waited near the Alder Street exit. Soon after Osborne and Dickerson parked in the Happy Hill neighborhood, they saw a blue Mitsubishi enter the neighborhood traveling westbound on Mock Street. The car's license plate was WTH 3453. It was driven by a black male wearing a white T-shirt. The officers followed the car. Osborne, who was in the passenger seat of the patrol car, entered the license plate information into his computer. It came back as registered to a Kelvin Johnson, black male, with a date of birth of 5 August 1964. The computer also informed Osborne that the registered owner's driver's license was suspended. Osborne then told Dickerson to stop the Mitsubishi, at which point Dickerson initiated a traffic stop of defendant's vehicle at the 700 block of Pitts Street, approximately 100 yards from the original area mentioned in the tip.

At the traffic stop, defendant was ordered by Dickerson to stay in the vehicle and asked if he had a driver's license, whereupon defendant answered that he did not have a license, but did have a North Carolina identification card. After learning this information, Dickerson asked defendant to get out of the car and frisked defendant for weapons. Dickerson then spoke with Navy and told him of defendant's license status. Officer Navy placed defendant under arrest for driving while license revoked. At trial, Dickerson testified that, "[w]e placed him in the back of our patrol car and then we began a search of the vehicle incident to arrest."

During the search of the vehicle, the officers found guns and ammunition. These weapons formed the basis for the weapons charges against defendant. On 9 July 2008, Judge L. Todd Burke held a hearing on defendant's motion to suppress this evidence. In denying the motion, Judge Burke held that the officers had a reasonable and articulable suspicion to stop the Mitsubishi based on the anonymous informant's tip.

STATE v. JOHNSON

[204 N.C. App. 259 (2010)]

On 29 September 2008, Judge Burke entered written findings of fact and conclusions of law with regard to the suppression hearing. In those findings the court stated that the officers performed the search of the vehicle incident to defendant's arrest. The court further found that the officers stopped defendant before he reached the intersection where the anonymous tipster had indicated that the illegal activity had or would occur. Finally, the court concluded that the stop was lawful under *Alabama v. White*, 496 U.S. 325, 110 L. Ed. 2d 301 (1990).

On 24 October 2008, defendant filed a *pro se* motion to suppress with the Forsyth County Clerk. On 5 November 2008, the Honorable Judge Spivey heard defendant's motion. During his hearing, defendant stated that he lived in the neighborhood, not more than 50 yards from where he was stopped. Judge Spivey found that the motion was consumed by Judge Burke's order, and therefore did not rule on the merits of the motion.

On 13 January 2009, defendant pled guilty to one count of possession of a firearm by a felon, two counts of possession of a stolen firearm, one count of carrying a concealed gun, and one count of driving while license revoked. Also, during the sentencing phase, defendant admitted his status as an habitual felon. Defendant specifically preserved his right to appeal the denial of his motion to suppress. Defendant was sentenced to 110 to 141 months' imprisonment on the consolidated charges.

On appeal, defendant contends that (1) the trial court erred when it held, as a matter of law, that the anonymous tip possessed sufficient indicia of reliability to justify the officers' warrantless stop of defendant's car, and (2) that the warrantless search of defendant's car following his arrest for driving with a suspended license, which was conducted while he was detained in the backseat of a police car, was unconstitutional.

II. STANDARD OF REVIEW

When reviewing a trial court's ruling on a motion to suppress evidence, an appellate court determines whether the challenged findings of fact are supported by (1) competent evidence and (2) whether those findings support the trial court's conclusions of law. However, the trial court's conclusions of law are reviewed *de novo* and must be legally correct. *State v. Hernandez*, 170 N.C. App. 299, 304, 612 S.E.2d 420, 423 (2005); *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]."

STATE v. JOHNSON

[204 N.C. App. 259 (2010)]

In re Appeal of the Greens of Pine Glen Ltd. P'ship, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

III. ANONYMOUS TIP AS A BASIS FOR DEFENDANT'S STOP

Defendant contends that the trial court committed error by upholding the warrantless stop of his car based solely on the information provided to the police by an anonymous tipster. We conclude that, while the tip at issue included identifying details of a person and car allegedly engaged in illegal activity, it offered few details of the alleged crime, no information regarding the informant's basis of knowledge, and scant information to predict the future behavior of the alleged perpetrator. Thus, given the limited details contained in the tip, and the failure of the officers to corroborate the tip's allegations of illegal activity, the tip lacked sufficient indicia of reliability to justify the warrantless stop in this case.

Where the justification for a warrantless stop is information provided by an anonymous informant, a reviewing court must assess whether the tip at issue possessed sufficient indicia of reliability to support the police intrusion on a detainee's constitutional rights. *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (1983). Courts have repeatedly recognized, as a general rule, the inherent unreliability of anonymous tips standing on their own. *Alabama*, 496 U.S. at 329, 110 L. Ed. 2d at 308 (“[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity[.]”). While an anonymous tip can provide an officer with reasonable suspicion to conduct a traffic stop, it must itself possess sufficient indicia of reliability, or it must be corroborated by the officer's investigation or observations.

In *State v. Hughes*, 353 N.C. 200, 209, 539 S.E.2d 625, 632 (2000), our Supreme Court applied the anonymous tip standard articulated in *White* to the facts before it. In upholding the trial court's grant of that defendant's motion to suppress, the Court in *Hughes* found the information provided by the anonymous informant to be vague when compared to the information provided by the tipster in *White*. Crucial to the *Hughes* Court was the fact that the “information provided did not contain the ‘range of details’ required by *White* and *Gates* to sufficiently predict defendant's specific future action[.]” *Id.* at 208, 539 S.E.2d at 631.

Similarly, in *State v. Peele*, — N.C. App. —, 675 S.E.2d 682, *disc. review denied*, 363 N.C. 587, 683 S.E.2d 383 (2009), this Court reversed the trial court's denial of the defendant's motion to suppress evidence obtained following a stop of his vehicle based on informa-

STATE v. JOHNSON

[204 N.C. App. 259 (2010)]

tion provided by an anonymous tipster. In *Peele*, the officer received a dispatch call indicating that a burgundy Chevrolet pickup truck was headed toward the Holiday Inn intersection and was “a possible careless and reckless, D.W.I.” The officer arrived at the intersection within a second and saw a truck that matched the description dispatch had provided. The officer followed the truck for approximately one-tenth of a mile and observed it weave once within its lane of travel. *Id.* at —, 675 S.E.2d at 684-85. This Court held that, while the caller accurately described the car’s physical characteristics, the caller gave police no way to test his or her credibility.

Read together, *White*, *Hughes*, and *Peele* make clear that where an anonymous tip forms the basis for a traffic stop, the tip itself must exhibit sufficient indices of reliability, or it must be “buttressed by sufficient police corroboration.” *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630. The type of detail provided in the tip and corroborated by the officers is critical in determining whether the tip can supply the reasonable suspicion necessary for the stop. Where the detail contained in the tip merely concerns identifying characteristics, an officer’s confirmation of these details will not legitimize the tip. Regarding this point, the Court in *Hughes* stated that

[a]n accurate description of a subject’s readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Hughes, 353 N.C. at 209, 539 S.E.2d at 632 (quoting *Florida v. J.L.*, 529 U.S. 266, 272, 146 L. Ed. 2d 254, 261 (2000)).

This case is analogous to *Peele* and *Hughes*. In the present case, the anonymous caller provided identifying information concerning a black male suspect wearing a white shirt in a blue Mitsubishi with a certain license plate number. The caller alleged that this individual was selling drugs and guns at the intersection of Pitt and Birch Streets. Here, as in *Peele*, “[t]he record contains no information about who the caller was, no details about what the caller had seen, and no information even as to where the caller was located.” *Peele*, — N.C. App. at —, 675 S.E.2d at 686. As in *Hughes*, *Peele*, and *White*, there was nothing inherent in the tip itself to allow a court to deem it reli-

STATE v. JOHNSON

[204 N.C. App. 259 (2010)]

able and to provide the officers with the reasonable suspicion necessary to effectuate a stop. There was also nothing observed by the officers during their brief surveillance of defendant as he drove in the neighborhood which could have provided them with reasonable suspicion to stop his car. Thus, the only way that the anonymous tip could justify defendant's detention is if the tip contained sufficient detail, corroborated by the officers, to warrant a reasonable person to believe that criminal activity was afoot. Confirmation of the single prediction that an unnamed suspect would return to the area shortly is analogous to the confirmation which was deemed insufficient in *Hughes and Peele. Peele*, — N.C. App. at —, 675 S.E.2d at 686 (providing that "confirmation that defendant was heading in the general direction indicated by tipster 'is simply not enough detail in an anonymous tip situation' "). *Id.* (quoting *Hughes*, 353 N.C. at 210, 539 S.E.2d at 632).

We note, however, even though the police officers did not have articulable reasonable suspicion to stop defendant's car based on the anonymous tip, the officers did lawfully stop the vehicle after discovering that the registered owner's driver's license was suspended. *See State v. Styles*, 362 N.C. 412, 416, 665 S.E.2d 438, 441 (2008) (holding that an officer may stop a vehicle upon a reasonable suspicion that the driver has committed a traffic violation); and *State v. McRae*, — N.C. App. —, —, S.E.2d —, — (filed 6 April 2010) (COA09-114) (holding that two separate grounds existed to support a finding of reasonable suspicion—the officer's observation of a traffic violation as well as an anonymous tip received by the officer). Since nothing in the anonymous tip involved a revoked driver's license, the scope of the stop should have been limited to a determination of whether defendant's driver's license was suspended. *See State v. Jackson*, — N.C. App. —, —, 681 S.E.2d 492, 496 (2009) (providing that "the scope of the detention must be carefully tailored to its underlying justification").

IV. SEARCH INCIDENT TO DEFENDANT'S ARREST

Defendant next contends that his rights under the Fourth Amendment to the United States Constitution were violated when police searched his vehicle after his arrest for driving with a revoked driver's license. We conclude that *Gant*, — U.S. —, 173 L. Ed. 2d 485, governs in this issue. As such, we hold that the search of defendant's car was unreasonable and violated defendant's Fourth Amendment rights because the officers could not reasonably have believed that evidence of defendant's driving while license suspended

STATE v. JOHNSON

[204 N.C. App. 259 (2010)]

might have been found in the passenger compartment of the car, and as defendant was in the police car while the officers were conducting the search, defendant could not have accessed the passenger compartment of his car at the time of the search.

A. Preservation for Appeal

The trial court denied defendant's motion to suppress the evidence obtained during the warrantless search of defendant's car based, in part, on the finding that the search was justified as being incident to an arrest. At the time of the suppression hearing, North Carolina law interpreting *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768 (1981) made clear that police had broad authority to search a vehicle incident to the driver's arrest. *State v. Cooper*, 304 N.C. 701, 703-05, 286 S.E.2d 102, 103-04 (1982). Accordingly, defendant did not assert the unconstitutionality of the search of his car incident to his arrest for driving with a suspended or revoked license as an alternate ground to support his motion to suppress evidence.

As a general rule, the failure to raise an alleged error in the trial court waives the right to raise it for the first time on appeal. *State v. Oliver*, 309 N.C. 326, 334, 307 S.E.2d 304, 311 (1983); N.C.R. App. P. 10(b)(1). Here, the constitutional challenge to the search of defendant's car incident to his arrest did not exist under controlling North Carolina law at the time of the hearing. On 9 July 2008, the trial court denied defendant's motion to suppress. On 13 January 2009, defendant pled guilty to the aforementioned charges and specifically preserved his right to appeal the denial of his motion to suppress. Defendant gave his notice of appeal to this Court the next day. The Supreme Court of the United States decided *Arizona v. Gant* on 21 April 2009. It is clear that *Gant* applies retroactively to this case, since this case is currently on direct review, and is not yet final. *Griffith v. Kentucky*, 479 U.S. 314, 93 L. Ed. 2d 649 (1987); *State v. Lucas*, 353 N.C. 568, 598, 548 S.E.2d 712, 732 (2001). Moreover, our North Carolina statutes provide that where a retroactive application of a new standard is required, errors based upon that new standard "may be the subject of appellate review even though no objection, exception or motion has been made in the trial division." N.C. Gen. Stat. § 15A-1446(d)(19) (2009).

B. Constitutionality of the Search Incident to Arrest

The United States Supreme Court, in its decision of *Arizona v. Gant* held that:

STATE v. JOHNSON

[204 N.C. App. 259 (2010)]

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.

556 U.S. at —, 173 L. Ed. 2d at 501. In *Gant*, the arrestee was secured in the back of the police car after his arrest for a misdemeanor traffic offense at the time his car was searched. The *Gant* Court held that the search under these circumstances was unreasonable and violated Gant's Fourth Amendment rights.

The present case cannot be distinguished in any constitutionally relevant sense from *Gant*. Here, defendant was arrested for driving while his license was suspended or revoked and placed in the rear of the patrol car. At least three officers were present at the stop and arrest. After defendant was secured in the back of the patrol car, the officers began their search of his car incident to his arrest.

In *Gant*, officers knocked on the door of a house after receiving a tip that the house was being used to sell drugs. Gant answered the door, and the officers asked to speak to the owner of the house. Gant identified himself and said that he expected the owner to return later. The officers left and conducted a record check on Gant. They learned that his driver's license had been suspended and that there was an outstanding warrant to arrest him for driving with a suspended license. The officers returned to the house that night and saw Gant driving into the driveway of the house. The officers recognized him and his car. They arrested Gant for driving with a suspended license and handcuffed him when he got out of the car. After two more officers arrived in a police car, the officers locked Gant in the back of the police car, searched Gant's car, and found a bag of cocaine in a jacket on the backseat and a gun. *Id.* at —, 173 L. Ed. 2d at 491-92.

Based on these facts, the *Gant* Court ruled that the warrantless search of Gant's car was not constitutional as a search incident to Gant's arrest, because Gant was not within reaching distance of his car at the time of the search. The Court recognized that, given the many means available to officers to "ensur[e] the safe arrest of vehicle occupants, it will be the rare case in which . . . a real possibility of access to the arrestee's vehicle remains." *Id.* at — n.4, 173 L. Ed. 2d at 496 n.4.

The facts here cannot be distinguished in any meaningful way from *Gant* given that the three officers in this case outnumbered the one arrestee and the arrestee had been secured in a patrol car at the

STATE v. JOHNSON

[204 N.C. App. 259 (2010)]

time of the search. Thus, here, as in *Gant*, the arrestee “clearly was not within reaching distance of his car at the time of the search.” *Id.* at —, 173 L. Ed. 2d at 497. The Court also emphasized in *Gant* that it was not reasonable to believe that Gant’s car contained evidence of the offense for which he had been arrested: “Gant was arrested for driving with a suspended license—an offense for which police could not expect to find evidence [of] in the passenger compartment of Gant’s car.” *Id.* at —, 173 L. Ed. 2d at 485. With regard to this point, the facts in the present case are strikingly similar to those in *Gant*, given that defendant was arrested for driving while license suspended or revoked—a motor vehicle misdemeanor for which the officers could not expect to find evidence in the passenger compartment of the car.

C. Completeness of the Suppression Hearing Record to Decide Defendant’s *Gant* Argument

Finally, with regard to this issue, we note that because defendant did not object to the search under *Gant*, the State requests that this Court remand the case back to the trial court for a new suppression hearing. We disagree.

While the suppression hearing was focused on the constitutionality of the police officer’s stop of defendant, the record exceeds that scope, and covers in detail all aspects of the encounter including: the stop, the officer’s questioning of defendant regarding his license, defendant’s arrest for driving on a suspended or revoked license, defendant’s removal to the backseat of the patrol car, and the subsequent search of defendant’s car incident to his arrest.

The prosecutor’s questions at the hearing were designed to elicit all information concerning the officer’s stop and subsequent search of defendant’s vehicle. Further, Officer Dickerson’s detailed report concerning the entire incident was admitted at the hearing and is included in the record on appeal. According to the officers, defendant was arrested shortly after the stop. For instance, defendant was asked for his driver’s license; defendant admitted he did not have a license; and as a result, the officers immediately arrested defendant for driving with a revoked license. After being arrested, defendant was placed in the rear of the patrol car and Sergeant Osborne searched the car. While searching, Sergeant Osborne found a handgun after he opened the door and looked under the driver’s seat.

The only possible exceptions to the warrant requirement that the State could have used to justify this search or seizure would have

STATE v. JOHNSON

[204 N.C. App. 259 (2010)]

been probable cause to search the automobile or plain view. It is clear from the record that neither of these justifications apply. The entire basis of the officers' information that there was evidence of contraband in the car came from the anonymous informant. Because we find that the anonymous tip did not even provide the officers with reasonable suspicion to stop the car, there is no support for a finding of probable cause to search.

Moreover, the facts of this case do not support a finding that the plain view doctrine justified the seizure of the evidence. The plain view doctrine allows an officer to seize an item that is in plain view when he is in an area that he has a right to be, the character of the item as evidence or contraband is apparent, and the sighting is inadvertent. *State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d 482, 487 (2001). Here, Sergeant Osborne did not see the first gun seized until he opened the driver's door and looked underneath the driver's seat. Thus, absent some other justification for the search, Sergeant Osborne did not observe the first gun from a location that he had a right to be, and the gun's discovery was not inadvertent. Accordingly, plain view does not apply and the officers' search of defendant's vehicle incident to his arrest for driving while license revoked was unreasonable under the Fourth Amendment.

V. CONCLUSION

For the reasons stated above, we hold that defendant's motion to suppress was improperly denied. Further, given that all of the State's evidence of contraband and weapons should have been suppressed, defendant's convictions for possession of a firearm by a felon, two counts of possession of a stolen firearm, and one count of carrying a concealed weapon should be vacated. As provided above, the officers lawfully stopped defendant's vehicle for driving while license revoked, therefore, that conviction must stand. As such, the trial court's order denying defendant's motion to suppress is reversed, its judgment is partially vacated, and we remand to the trial court for sentencing as to defendant's driving while license revoked conviction.

Reversed, vacated and remanded.

Judges HUNTER, Robert C., and JACKSON concur.

BIOLETTI v. BIOLETTI

[204 N.C. App. 270 (2010)]

JOHN MICHAEL BIOLETTI, PLAINTIFF v. ADELINA MARY BIOLETTI, DEFENDANT

No. COA09-876

(Filed 1 June 2010)

Estoppel— judicial estoppel—conversion—contradictory statements of ownership in federal bankruptcy court and state court

The trial court did not abuse its discretion in a conversion case by applying judicial estoppel and granting summary judgment in favor of defendant in regard to contested funds received from the parties' deceased brother. To allow plaintiff to seek recovery of the now contested monies from defendant would permit him to file contradictory statements of ownership in the federal bankruptcy court and the state court. Plaintiff would receive an unfair advantage because it would be inequitable to allow him to assert the right to recoup an amount in excess of \$92,000 when plaintiff only disclosed that he was entitled to \$24,797.14 in his filings in the bankruptcy court.

Appeal by plaintiff from a judgment entered 6 April 2009 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 November 2009.

John F. Rudisill and Leslie C. Rawls, for Plaintiff.

Franklin S. Hancock, for Defendant.

ERVIN, Judge.

Plaintiff John Michael Bioletti appeals from an order entered by the trial court on 6 April 2009 granting summary judgment in favor of Defendant Adelina Mary Bioletti. After a careful review of the record in light of the applicable law, we affirm the trial court's order.

I. Statement of Facts

On 14 October 2005, Plaintiff filed a petition seeking relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of North Carolina. In his bankruptcy petition, Plaintiff alleged that he did not have any funds with which to pay his creditors. On 27 October 2005, William Bioletti, who was Plaintiff's and Defendant's brother, died. As a result of William Bioletti's death, Plaintiff was entitled to certain "monies and financial

BIOLETTI v. BIOLETTI

[204 N.C. App. 270 (2010)]

accounts.” On 4 November 2005, Plaintiff executed a hand-written agreement transferring his interest in any monies that he was entitled to receive from William Bioletti to Defendant.¹

The meeting of creditors held in connection with Plaintiff’s bankruptcy proceeding occurred on 16 November 2005. On 20 January 2006, the Honorable J. Craig Whitley, United States Bankruptcy Judge, entered an order granting Plaintiff’s request for a bankruptcy discharge.² On 21 January 2006, Plaintiff filed an amended property schedule in the bankruptcy proceeding which indicated that he had received \$24,747.19 as a result of the death of William Bioletti. On 14 July 2007, Judge Whitley issued a final decree officially closing Plaintiff’s bankruptcy case.

On 2 October 2008, Plaintiff filed a complaint in the Superior Court of Mecklenburg County in which he sought the entry of a judgment against Defendant “for conversion of monies and fraud in excess of \$92,000” and reasonable attorneys’ fees. Plaintiff’s complaint asserted claims against Defendant for an accounting, for fraud and conversion, for the imposition of a constructive trust, and for punitive damages. In essence, Plaintiff alleged that Defendant had unlawfully converted to her own use monies which he was entitled to receive from insurance policies and retirement accounts owned by William Bioletti.

On 4 December 2008, Defendant filed a motion seeking the dismissal of Plaintiff’s claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), or in the alternative, a motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56. According to Defendant, Plaintiff’s claims were “barred by the equitable doctrines of laches and judicial estoppel” because Plaintiff had asserted in his complaint “a position and facts . . . that differ from the facts asserted in [the Bankruptcy Court] three years ago.” More specifically, Defendant stated:

On October 14, 2005, Plaintiff filed Chapter 7 bankruptcy, and alleged that he did not have any funds available to pay his creditors. . . . Plaintiff benefitted from his assertion and gained a bank-

1. According to Plaintiff, the transfer agreement was dictated by Defendant, who then “took [Plaintiff] to a branch bank to have his signature witnessed and notarized.” Plaintiff and Defendant sharply disagreed about the circumstances under which this agreement was executed. In light of our decision to uphold the trial court’s order, we need not address the factual disputes surrounding the execution of this transfer agreement in any detail.

2. Apparently, Defendant paid all of Plaintiff’s debts.

BIOLETTI v. BIOLETTI

[204 N.C. App. 270 (2010)]

ruptcy discharge. . . . However, Plaintiff now asserts to this Court that he was entitled to the funds he gave to Defendant, alleging that Defendant was only holding them in some sort of trust. These factual positions and assertions are contradictory—one or the other cannot be true. It would be inequitable for Plaintiff to now assert a set of facts different from facts he asserted successfully in another court and from which he benefitted.

Defendant attached a series of exhibits, consisting of documents from Plaintiff's bankruptcy proceedings, and an affidavit to her motion. In her affidavit, Defendant asserted that Plaintiff's "bankruptcy attorney . . . called me and told me that if the Plaintiff inherited anything from William, and then tried to hide it, he would be in trouble with that court because of attempted fraud. ([Plaintiff] had not told the bankruptcy court about the inherited money.)"

On 16 January 2009, Plaintiff filed a reply to Defendant's motion accompanied by certain exhibits, including an amended property schedule from his bankruptcy proceeding, and an affidavit. On 2 February 2009, Plaintiff filed a motion seeking leave to amend his complaint and a proposed amended complaint, which contained the following new allegations:

- 26A. On October 17, 2005, Plaintiff filed for bankruptcy relief in Bankruptcy No. 05-35662 under Chapter 7 in the United States Bankruptcy Court for the Western District of North Carolina, prior to the death of William Bioletti on October 27, 2005.
- 26B. After Defendant received monies due Plaintiff from the death of William Bioletti and transferred them to a joint account with Defendant, he amended his Schedules B and C in Bankruptcy No. 05-35662 to show the receipt of monies, *viz.*, "Debtor inherited \$24,747.19 from deceased brother, William Bioletti (he passed after the filing date of the debtor)," as shown on the "SCHEDULE B. PERSONAL PROPERTY—AMENDED" and "SCHEDULE C. PROPERTY CLAIMED AS EXEMPT-AMENDED," both signed by him and attached to the "REPORT OF TRUSTEE UNDER BANKRUPTCY RULE 3011, APPLICATION TO DEPOSIT MONIES TO THE REGISTRY ACCOUNT AND APPLICATION FOR DISCHARGE OF TRUSTEE" by Langdon M. Cooper dated 4th of July, 2007, labeled Plaintiff's Exhibit 1 to First Amendment."

. . . .

BIOLETTI v. BIOLETTI

[204 N.C. App. 270 (2010)]

26D. Defendant sent sufficient monies to the attorney for Plaintiff in Bankruptcy No. 05-35662 to pay his creditors in full, AND for Plaintiff to receive \$9,494.76 back, but these are the only monies that Plaintiff received the benefits that were payable to him from the death of William Bioletti, either from the joint account or any account Defendant deposited said funds in, subject to their understanding that Plaintiff had that his sister, Defendant, was entrusted with said funds for his, not her, benefit.

26E. Defendant was aware that Plaintiff was vulnerable to manipulation, intimidation and deceit due to his low intelligence, his personal developmental disorder and his basic desire to please his family rather than to confront her behavior, and she took advantage of his mental and emotional state to control his money, have him prepare and sign a purported document of gift, leave him subject to large tax assessments and allow him to exist in a state of continued poverty, hunger and need, when, upon information and belief, his brother apparently and undisputedly had left him his sole beneficiary of certain, but not all, insurance policies and retirement benefits to add to his ability to live with some happiness.

The trial court never ruled on Plaintiff's motion for leave to amend his complaint. After consideration of the "briefs and exhibits submitted by the parties," "the court file," and the arguments of counsel, the trial court entered an order granting Defendant's motion for summary judgment³ on 6 April 2009 on the grounds that, "[t]o allow the Plaintiff to seek to recover the now-contested monies from the Defendant would permit him to file contradictory statements of ownership in the federal bankruptcy court and the state court;" that "[s]uch action should not be permitted;" and that "Plaintiff is estopped from now pursuing these claims against Defendant in state court."⁴ Plaintiff noted an appeal to this Court from the trial court's order.

3. The trial court expressly recognized that, since it had "considered matters outside [the] pleadings," it should "treat this matter as a motion for summary judgment under N.C. Gen. Stat. § 1A-1, Rule 56(b)."

4. The trial court did not, contrary to the implication of certain statements contained in Plaintiff's brief, make findings of fact in ruling on Defendant's summary judgment motion. Instead, the trial court's factual recitations reflect the facts that the trial court considered to be "undisputed and uncontradicted."

BIOLETTI v. BIOLETTI

[204 N.C. App. 270 (2010)]

II. Legal AnalysisA. Standard of Review

Generally, “[o]ur standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). Summary judgment is also appropriate when the “plaintiff cannot surmount an affirmative defense which would bar the claim.” *Gibson v. Mutual Life Ins. Co. of N.Y.*, 121 N.C. App. 284, 286, 465 S.E.2d 56, 58 (1996) (citation omitted). “‘When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.’” *Jones*, 362 N.C. at 573, 669 S.E.2d at 576 (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)). “If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.” *Jones*, 362 N.C. at 573, 669 S.E.2d at 576 (citing *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982); N.C. Gen. Stat. § 1A-1, Rule 56(e)). “Nevertheless, ‘[i]f there is any question as to the weight of evidence[,] summary judgment should be denied.’” *Id.* (quoting *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999)).

In addition, we acknowledge that “a trial court’s application of judicial estoppel is reviewed for abuse of discretion.” *Whitacre P’ship v. Biosignia, Inc.*, 358 N.C. 1, 38, 591 S.E.2d 870, 894 (2004) (citation omitted). This is because “an action pled [which] is barred by a legal impediment, such as judicial estoppel,” has “no triable issues of fact as a matter of law.” *Whitacre P’ship*, 358 N.C. at 39, 591 S.E.2d at 895 (citation omitted). “Thus, when a trial court has acted within its discretion in applying judicial estoppel, leaving no triable issues of material fact, summary judgment is appropriate.” *Id.* As a result, we must determine here whether the trial court abused its discretion by applying the doctrine of judicial estoppel to Plaintiff’s complaint. If the trial court did not abuse its discretion in determining that Plaintiff is judicially estopped from seeking to recover the disputed monies from Defendant, there are no triable issues of fact in this case as a matter of law, rendering summary judgment appropriate.

BIOLETTI v. BIOLETTI

[204 N.C. App. 270 (2010)]

B. Judicial Estoppel

In *Whitacre P'ship*, the Supreme Court discussed the doctrine of judicial estoppel, which is derived from *New Hampshire v. Maine*, 532 U.S. 742, 149 L. Ed. 2d 968 (2001), as it applies in this jurisdiction. The Court noted that “the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle.” *Whitacre P'ship*, 358 N.C. at 28, 591 S.E.2d at 888 (citation omitted). The fundamental purpose of the doctrine of judicial estoppel is “to protect the integrity of the judicial process.” *Id.*

[J]udicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation. The doctrine prevents the use of intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.

Price v. Price, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005) (citation omitted). In *Whitacre P'ship*, the Court identified three factors that may be used to determine if the doctrine applies.

First, a party's subsequent position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Whitacre P'ship, 358 N.C. at 29, 591 S.E.2d at 888-89 (citations and quotations omitted). Accordingly, in order to determine whether the trial court properly applied the doctrine of judicial estoppel in order to bar the assertion of Plaintiff's claim in this case, we must first consider whether the position that Plaintiff has taken in the present case is clearly inconsistent with the position that he took in the bankruptcy proceeding. If the positions that he took in those proceedings are inconsistent, we must then consider the other elements required for the appropriate application of judicial estoppel in accordance with well-established principles of North Carolina law.

BIOLETTI v. BIOLETTI

[204 N.C. App. 270 (2010)]

Reduced to its essentials, Plaintiff's challenge to the trial court's order rests on a contention that the record does not establish that he failed to inform the Bankruptcy Court of his interest in the funds that he is seeking to recover through the present civil action, and that the trial court could not appropriately conclude that he took a position in the Bankruptcy Court that was inconsistent with the position that he took in this Court for that reason. In advancing this contention, Plaintiff argues that the factual materials upon which Defendant relied in successfully persuading the trial court to grant summary judgment in her favor were "insufficient to support the [trial] court's finding" due to "(1) lack of a relevant time frame; (2) lack of first-hand knowledge and failure of supporting documents; (3) lack of connection to the funds at issue; and (4) contrary evidence in the court file." After careful consideration of Plaintiff's challenges to the trial court's order in light of the record and the applicable law, we conclude that none of Plaintiff's arguments are persuasive.

The evidence concerning the payments that Plaintiff received as a result of William Bioletti's death is undisputed. According to the affidavit that he submitted in opposition to Defendant's summary judgment motion, Great Western Retirement Services issued a \$14,349.83 check to Plaintiff as the result of William Bioletti's death on or about 15 February 2006. After Defendant brought this check to him, Plaintiff endorsed it and returned it to Defendant. On or about 16 February 2006, the Teachers' and State Employees' Retirement System issued a \$37,447.61 check to Plaintiff stemming from William Bioletti's death. Plaintiff endorsed this check and returned it to Defendant after she brought it to him. On or about 19 July 2006, the Teachers' and State Employees' Retirement System issued a \$40,354.69 check to Plaintiff as a result of William Bioletti's death. After endorsing this check in blank, Plaintiff gave this check to Defendant. As is evidenced by both the complaint he filed in this case on 2 October 2008 and his affidavit in opposition to Defendant's summary judgment motion, Plaintiff contended that he was entitled to recover in excess of \$92,000 from Defendant, all of which originated from insurance contracts, retirement accounts or similar instruments originally owned by William Bioletti.⁵

5. The parties disagreed sharply over the circumstances under which Plaintiff endorsed these checks. On the one hand, Plaintiff contended in his affidavit that Defendant told him that the attorney for William Bioletti's estate had told her that Plaintiff needed to endorse the checks and that he believed that, "when the estate was over, that whatever was left, [Defendant] would automatically invest the rest of my money." On the other hand, Defendant indicated in her affidavit that Plaintiff made a gift of the monies in question to her by means of the transfer agreement discussed earlier in this opinion.

BIOLETTI v. BIOLETTI

[204 N.C. App. 270 (2010)]

On the other hand, the factual materials in the record demonstrate that Plaintiff filed a “no asset” claim for relief under Chapter 7 of the Bankruptcy Code on 14 October 2005. In bankruptcy proceedings, debtors are required to complete a Schedule B form, on which they disclose, among other things, “[c]ontingent and noncontingent interest in the estate of a decedent, death benefit plan, life insurance policy or trust;” “[o]ther contingent or liquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims;” and “[o]ther personal property of any kind not already listed.” The fact that Plaintiff did not own or have a claim to the accounts in question as of the date upon which he filed his bankruptcy petition did not absolve him from responsibility for disclosing the existence of these assets to the Bankruptcy Court, since 11 U.S.C. § 541(a)(5) provides that “[a]ny interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date” “by bequest, devise, or inheritance” or “as a beneficiary of a life insurance policy or a death benefit plan” is treated as part of the debtor’s bankruptcy estate. Although Plaintiff amended his bankruptcy petition to reflect that Plaintiff “inherited \$24,747.19 from deceased brother, William Bioletti (he passed away after the filing date of the Debtor),” he never listed the difference between the \$92,000.00 which he seeks to recover in this case and the \$24,747.19 which he disclosed on his amended report in any filing with the Bankruptcy Court. On 20 January 2006, Judge Whitley granted Plaintiff a discharge in bankruptcy. Subsequently, on 14 July 2007, Judge Whitley issued a final decree officially closing Plaintiff’s bankruptcy proceeding.

A careful examination of these undisputed facts in light of the factors enunciated in *Whitacre P’ship*, 358 N.C. at 29, 591 S.E.2d at 888-89, clearly demonstrates that the trial court did not abuse its discretion in concluding that Plaintiff was judicially estopped from claiming ownership. First, we ask whether “a party’s subsequent position [is] clearly inconsistent with its earlier position.” The undisputed evidentiary materials in the record clearly reflect that Plaintiff informed the Bankruptcy Court that his interest in the retirement accounts and insurance contracts owned by William Bioletti totaled \$24,747.19 and that he failed to disclose the remainder of the claim that he asserted against Defendant despite the requirement that he report “[c]ontingent and noncontingent interests in estate of a decedent, death benefit plan[s], life insurance polic[ies],

BIOLETTI v. BIOLETTI

[204 N.C. App. 270 (2010)]

or trust[s]” “other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims;” and “other personal property of any kind not already listed.” Regardless of the reason that the Plaintiff may have had for failing to disclose the additional \$67,000 that he has claimed in this case over and above the amount that he reported to the Bankruptcy Court, the simple fact of the matter is that Plaintiff disclosed \$24,747.19 received as the result of the death of William Bioletti in the bankruptcy proceeding while claiming the right to recover \$92,000 resulting from the death of William Bioletti in this proceeding. As a result, we conclude that the trial court correctly concluded that Plaintiff took inconsistent positions concerning the amount of money that he was entitled to take as the result of the death of William Bioletti in the bankruptcy proceeding and in this case.

Although Plaintiff disputes the validity of the trial court’s logic, which we have accepted on appeal, we do not find his arguments to be persuasive. The fact that Plaintiff believes that the conversation that Defendant allegedly had with Plaintiff’s bankruptcy attorney could have occurred prior to the receipt of the checks described in greater detail above, the fact that a statement attributed to Plaintiff’s bankruptcy attorney may have been hearsay, the fact that the funds in question may not be “inherited” funds, and the fact that Plaintiff did amend his bankruptcy filing on at least one occasion does not change the fact that Plaintiff never disclosed the full extent of his claim to ownership of monies stemming from William Bioletti’s death and that, by failing to make such disclosure, Plaintiff effectively asserted that he had no interest in any property passing as the result of William Bioletti’s death other than the \$24,797.14 amount that he disclosed to the Bankruptcy Court. Thus, we are simply unable to agree with Plaintiff’s arguments to the effect that the trial court erred by finding that he took inconsistent positions between the two proceedings or that there are issues of fact as to whether such inconsistent positions were taken.

Secondly, we ask whether “the party has succeeded in persuading a court to accept that party’s earlier position.” *Id.* After reviewing the relevant portions of the record, we conclude that Plaintiff did, in fact, succeed in persuading the Bankruptcy Court that the value of his interest in monies resulting from William Bioletti’s death totaled \$24,747.19. Although Plaintiff contends that Defendant “offered no evidence that the bankruptcy court accepted a final inventory and

BIOLETTI v. BIOLETTI

[204 N.C. App. 270 (2010)]

property distribution that did not account for the life insurance proceeds at issue here,” the record clearly reflects that Plaintiff received a discharge in bankruptcy and that Plaintiff never disclosed the full extent to which he claimed to be entitled to take monies stemming from the death of William Bioletti. Thus, we conclude that Plaintiff did, in fact, succeed in persuading the Bankruptcy Court that he was only entitled to receive \$24,797.19 as the result of William Bioletti’s death.

Finally, we ask whether “the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Id.* Although this Court has no bankruptcy jurisdiction and is reluctant, for that reason, to render an opinion concerning the effect that any understatement of Plaintiff’s claim to monies resulting from William Bioletti’s death may have had on the outcome of his bankruptcy proceeding, we can safely conclude that, if Plaintiff is allowed to proceed with his claims against Defendant, he may receive an amount in excess of \$92,000 from Defendant after Defendant “sent sufficient monies to the attorney for Plaintiff in Bankruptcy No. 05-35662 to pay his creditors in full, AND for Plaintiff to receive \$9,494.76 back.” Thus, we conclude that the record supports a finding that Plaintiff would obtain an unfair advantage in the event that we were to overturn the trial court’s decision to the effect that Plaintiff was judicially estopped from proceeding against Defendant in this case.

As a result, for the reasons stated above, after applying the *Whitacre P’ship* factors to the facts of this case, we conclude that the trial court did not abuse its discretion in dismissing Plaintiff’s claims on the basis of judicial estoppel. *See generally, Powell v. City of Newton*, — N.C. App. —, —, 684 S.E.2d 55, 59 (2009) (stating that the “[p]laintiff’s current position that he did not agree to surrender a quitclaim deed in exchange for \$40,000.00 clearly is inconsistent with his position before the trial judge that “[T]hat’s my agreement[,]” and therefore, “[p]ursuant to the doctrine of judicial estoppel, plaintiff ought not be permitted to now assert” an inconsistent position). It would be inequitable to allow Plaintiff to assert the right to recoup an amount in excess of \$92,000 resulting from the death of William Bioletti in this case when he only disclosed that he was entitled to \$24,797.14 in his filings in the Bankruptcy Court. As a result, since the trial court “acted within its discretion in applying judicial estoppel,” since there are “no triable issues of material fact” in this case, and since “summary judgment [was] appropriate,” *Whitacre P’ship*, 358

STATE v. PADDOCK

[204 N.C. App. 280 (2010)]

N.C. at 38, 591 S.E.2d at 895 (citation omitted), the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges STROUD and ROBERT N. HUNTER, JR. concur.

STATE OF NORTH CAROLINA v. LYNN MARIE PADDOCK

No. COA09-538

(Filed 1 June 2010)

1. Evidence— prior bad acts—admissible under Rules 404(b) and 403

The trial court in a felonious child abuse inflicting serious bodily injury and first-degree murder case did not abuse its discretion in admitting evidence of defendant's abuse of all her surviving children. The evidence was admissible under N.C.G.S. § 8C-1, 404(b) to show defendant's intent, plan, scheme, system, or design to inflict cruel suffering on the victim, as well as malice and lack of accident, and the probative value of the evidence was not substantially outweighed by its prejudicial effect.

2. Evidence— expert opinion—no error

The trial court did not err in allowing an expert to testify that the victim and several of the victim's siblings were victims of ritualistic child abuse, sadistic child abuse, and torture. The expert's testimony did not amount to inadmissible opinion testimony on the credibility of the victim's siblings and the trial court's admission of the expert's testimony regarding the use of the word "torture" was not an abuse of discretion.

Appeal by defendant from judgment entered 12 June 2008 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 13 January 2010.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Ann B. Petersen for defendant-appellant.

STATE v. PADDOCK

[204 N.C. App. 280 (2010)]

BRYANT, Judge.

Defendant Lynn Paddock appeals from judgments entered 12 June 2008 in accordance with jury verdicts finding her guilty of felonious child abuse inflicting serious bodily injury and first-degree murder. For the reasons stated herein, we hold no error.

On Sunday, 26 February 2006, emergency medical responders were called to the home of defendant and Johnny Paddock, where three-year-old Sean Paddock was found dead. An autopsy revealed that Sean died of asphyxiation caused by compression to his chest which prevented him from being able to breathe. The medical examiner also noted long, linear bruises on Sean's back and buttocks which were in various stages of healing.

Defendant and Johnny Paddock lived on a small farm in Johnston County with seven children: Toni, Jasmine, Randy, Dan, Hailey, Karen, and Sean Paddock.¹ Jasmine was the biological daughter of Johnny Paddock. Toni, Randy, Dan, Hailey, Karen, and Sean were adopted.

On the day of Sean's death, Dr. Benjamin Winter, an emergency room physician, examined Karen, Dan, and Hailey, who at the time were nine, nine, and seven years old, respectively. Dr. Winter later testified that each child exhibited bruises and abrasions in various stages of healing on their legs, knees, thighs, buttocks, and backs. Dr. Winter also noted that Karen and Hailey had an excessive amount of hair, a condition known as hirsutism, which can be caused by malnutrition.

That afternoon, officers in the Johnston County Sheriff's Department interviewed members of the Paddock family. Detective James Gerrell took notes during defendant's interview. After initially denying any knowledge of how Sean died but admitting that she disciplined the children, defendant was informed that she would be charged with felonious child abuse and possibly murder. Defendant began to cry; she then stated that the night before Sean died, she wrapped him in three blankets, very tightly. Defendant was indicted on charges of felony child abuse inflicting serious injury and first-degree murder.

The State filed a pre-trial notice of intent to introduce 404(b) evidence that defendant engaged in continual and systematic abuse of Tammy, Jasmine, Randy, Karen, Dan, and Hailey. Defendant contested

1. With the exception of the deceased child, Sean, pseudonyms have been used to replace the true names of the children.

STATE v. PADDOCK

[204 N.C. App. 280 (2010)]

this, but in an order filed 6 June 2008, the trial court denied defendant's motion to exclude the 404(b) evidence concluding it was "relevant to show (1) a common plan, scheme, system or design by the defendant to inflict cruel suffering upon the victims for the purpose of punishment, persuasion, and sadistic pleasure, (2) motive, (3) malice, (4) intent, and lack of accident."²

At trial, the State presented evidence from defendant's surviving children: Jasmine, defendant's step-daughter, was twenty years old at the time of trial; Toni, adopted in 1996 at the age of nine and at the time of trial was twenty-one; Randy, adopted in 1998 at the age of seven and at the time of trial was seventeen; Karen, adopted in 2003 and was eleven at the time of trial; and Hailey and Dan, adopted in 2005, at the time of trial, were nine and eleven, respectively. In sum, the children testified to numerous acts of abuse by defendant directed toward them that increased in frequency and severity from the first adoption to the time of Sean's death.

Dr. Sharon Cooper testified as an expert in the field of developmental and forensic pediatrics. Based upon her examination, Dr. Cooper testified that the children were subjected to sadistic abuse, torture, and ritualistic abuse.

Defendant testified in her own defense and admitted that one of the ways in which she disciplined the children was by hitting them. Defendant also testified to various methods of discipline, such as: having the children jump up and down on a "rebounder," a small trampoline, to "run off some nervous energy"; forcing a child to ingest vomit; and making the children sit facing the wall for periods of time each day. On the night Sean died, defendant described wrapping him up to his neck in three blankets, and securing the blankets tighter than she had on previous occasions.

2. In its order denying defendant's motion to exclude the testimony of defendant's surviving children, the trial court made the following findings of fact:

4. The 404(b) testimony of Jasmine Paddock, Randy Paddock, and Toni Paddock revealed a pattern, [sic] of child abuse committed by the defendant against Jasmine Paddock, Toni Paddock, Randy Paddock, Karen Paddock, Hailey Paddock, [Dan Paddock] and Sean Paddock continuously over a period of sixteen years.

...

6. The prior acts of abuse committed by the defendant against Jasmine Paddock, Toni Paddock, Randy Paddock, Karen Paddock, Dan Paddock, Hailey Paddock, are sufficiently similar to the abuse committed by the defendant against Sean Paddock.

STATE v. PADDOCK

[204 N.C. App. 280 (2010)]

Following the close of the evidence, the jury found defendant guilty of felony child abuse inflicting serious bodily injury and first-degree murder under the felony murder rule based on murder by torture. The trial court entered judgment in accordance with the jury verdicts and sentenced defendant to seventy-three to ninety-seven months for felony child abuse and life without parole for first-degree murder. Defendant appeals.

On appeal, defendant raises the following two questions: did the trial court err by admitting (I) evidence that defendant abused her adopted children over the course of a decade; and (II) testimony that Sean Paddock died from fatal child homicide, and that the four youngest children were the victims of ritualistic and sadistic child abuse and torture.

I

[1] First, defendant argues the trial court erred in admitting evidence of defendant's abuse of all her surviving children. Defendant contends that such evidence served only to establish bad character, was dissimilar to the acts which resulted in the death of Sean Paddock, and was too remote in time to be admissible under Rules of Evidence 404 and 403. We disagree.

Under our Rules of Evidence, "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion" N.C. R. Evid. 404(a) (2009). However, under Rule 404(b) "[e]vidence of other crimes, wrongs, or acts . . . [may] be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. R. Evid. 404(b) (2009).

Rule 404(b) state[s] a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

Evidence of other [bad acts] committed by a defendant may be admissible under Rule 404(b) if it establishes the chain of circumstances or context of the charged crime. Such evidence is

STATE v. PADDOCK

[204 N.C. App. 280 (2010)]

admissible if the evidence of other [bad acts] serves to enhance the natural development of the facts or is necessary to complete the story of the charged crime for the jury.

State v. White, 340 N.C. 264, 284, 457 S.E.2d 841, 853 (1995) (internal citations omitted). If a trial court determines “the evidence is admissible under Rule 404(b), the court must still decide whether there exists a danger that unfair prejudice substantially outweighs the probative value of the evidence.” *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (citing N.C. R. Evid. 403 (2003)). We review a trial court’s determination to admit evidence under Rules 404(b) and 403 for abuse of discretion. *See State v. Lofton*, 193 N.C. App. 364, 373, 667 S.E.2d 317, 323 (2008) (reviewing evidence admitted under Rule 403); *State v. Aldridge*, 139 N.C. App. 706, 714, 534 S.E.2d 629, 635 (2000) (reviewing evidence admitted under Rule 404(b)).

Defendant acknowledges that when a person is charged with felonious child abuse, prior acts of violence alleged to have been committed by the defendant against the victim have been held to be admissible under Rule 404(b) as evidence of the defendant’s intent to cause injury to the victim. However, defendant argues that because the jury was allowed to also consider acts of violence perpetrated by defendant upon her surviving step-child and adopted children, the trial court violated Rule 404(b) by admitting evidence too dissimilar to the acts of violence perpetrated only upon Sean Paddock. We disagree.

In *State v. Anderson*, 350 N.C. 152, 513 S.E.2d 296 (1999), an unconscious two-and-a-half year old girl was brought to Wilkes Regional Medical Center covered with bruises, grab marks, pinch marks, scratches, bite marks, and other injuries. The child died the next day. *Id.* at 160, 513 S.E.2d at 301-02. The defendant, the girlfriend of the child’s uncle, was indicted for first-degree murder and felonious child abuse. *Id.* at 158, 513 S.E.2d at 301. After a *voir dire* to determine the admissibility of evidence of other acts of violence, two witnesses, one of whom was defendant’s neighbor, testified regarding defendant’s excessive disciplining of her own children. *Id.* at 173, 513 S.E.2d at 309. The testimony revealed that the defendant disciplined her own daughter by hitting her with a belt and disciplined her own son by biting him “real hard.” *Id.* Abrasions on the victim’s body were matched to the defendant’s belt and the defendant’s dental impressions. *Id.* at 173, 513 S.E.2d at 309. The defendant was convicted of felonious

STATE v. PADDOCK

[204 N.C. App. 280 (2010)]

child abuse and first-degree murder on the basis of malice, premeditation and deliberation; torture; and the felony murder rule. *Id.* at 158, 513 S.E.2d at 301. On appeal, the defendant argued that the evidence introduced by the two witnesses was not admissible for any purpose. Our Supreme Court disagreed, acknowledging that the State introduced the evidence to establish identity, plan, and absence of mistake, and declaring that all were proper purposes under Rule 404(b) and therefore “relevant in determining whether [the] defendant committed felonious child abuse and first-degree murder” *Id.* at 174, 513 S.E.2d 310.

In the instant case, the State gave pre-trial notice of its intent to introduce 404(b) evidence that defendant engaged in continual and systematic abuse of Toni, Jasmine, Randy, Karen, Dan, and Hailey. After hearing the *voir dire* testimony of Jasmine, Randy, and Toni, the trial court denied defendant’s motion to exclude the testimony of defendant’s surviving children, finding and concluding that the evidence revealed a pattern of abuse committed upon the Paddock children that was sufficiently similar to the abuse committed by defendant upon Sean Paddock, and that such evidence was relevant to show “(1) a common plan, scheme, system or design by the defendant to inflict cruel suffering upon the victims for the purpose of punishment, persuasion, and sadistic pleasure, (2) motive, (3) malice, (4) intent, and lack of accident.”

The trial testimony of defendant’s surviving children illustrated how defendant sought to control their behavior with daily routines and a pattern of corporal punishment that became more severe with each adoption and escalated significantly in the months prior to Sean’s death. Prior to the adoption of Karen, defendant experimented with a form of child rearing referred to as “tomato staking,” in which she kept all of her children right next to her so that she could observe them at all times. After the three youngest were adopted, “[i]t got much, much worse”: “[they] weren’t allowed to eat breakfast”; “weren’t allowed to talk”; “[were made to] eat[] on the floor”; and “lost the privilege of being able to get up and walk to the bathroom when [they] had to go.” Defendant “became more cold and calculated. She planned everything she did.” Defendant’s younger and most recently adopted children each testified to being hit with a spoon, switch, belt, or PVC pipe every day, as well as a daily routine requiring them to sit at an assigned place on the floor with their knees touching a wall for hours at a time. Additional instances of abuse involved defendant forcing a child to ingest vomit and fecal matter,

STATE v. PADDOCK

[204 N.C. App. 280 (2010)]

placing duct tape over a child's nose and mouth suffocating her, and confining a child to bed for at least four days without food.³

In the months before Sean died defendant began to wrap eight year old Karen at night to keep her still. Karen was bound with her arms by her side and her legs together; defendant then further immobilized her by placing a shelf over Karen's legs so that she could not roll over. When three year old Sean was found playing in bed, defendant began binding him, also. On Saturday, 25 February 2006, defendant immobilized Sean up to his neck in three blankets, constricting him to such a degree that he was unable to breathe, ultimately causing his death. The trial court admitted this evidence to show defendant's intent, plan, scheme, system or design to inflict cruel suffering, as well as malice and lack of accident. We hold the trial court did not err in admitting the evidence for the purposes stated, pursuant to Rule 404(b).

We next consider whether the admission of evidence under Rule 404(b) violated Rule 403. Under Rule 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" N.C. R. Evid. 403 (2009). "Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56 (citation omitted). " 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." Commentary, N.C. R. Evid. 403 (2009); *see also State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986). Where evidence of prior conduct is relevant to an issue other than the defendant's propensity to commit the charged offense, "the rule of inclusion [under Rule 404(b)] is constrained by the requirements of similarity and temporal proximity." *State v. al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citations omitted). "The determination of similarity and remoteness is made on a case-by-case basis, and the required degree of similarity is that which results in the jury's reasonable inference that the defendant committed both the prior and present acts. The similarities need not be unique and bizarre." *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (internal citations and quotations omitted).

3. Testimony from the emergency room physician who examined Dan on 26 February 2006 showed that Dan appeared malnourished—"significantly more thin than you would expect" and exhibiting symptoms consistent with deficiencies in Vitamin K, Vitamin C, zinc, and "a few of the minerals that are in your basic diet."

STATE v. PADDOCK

[204 N.C. App. 280 (2010)]

Remoteness in time is most important where evidence of another [bad act] is used to show that both [acts] arose out of a common scheme or plan: Remoteness in time is less important when the other [bad act] is admitted because its *modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried as to permit a reasonable inference that the same person committed both crimes.

State v. Schultz, 88 N.C. App. 197, 203, 362 S.E.2d 853, 857 (1987) (citation omitted). The determination to admit evidence under Rule 403 “is within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision.” *Stevenson*, 169 N.C. App. at 800-01, 611 S.E.2d at 209 (citation omitted).

In its order entered 6 June 2008, the trial court made the following findings of fact:

9. The probative value of the 404(b) evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury; the 404(b) evidence is more probative than prejudicial.
10. The 404(b) incidents are sufficiently similar and are not too remote in time.

Upon review of the evidence of record, we hold that the trial court did not abuse its discretion in allowing evidence of defendant’s other acts of violence as they were sufficiently similar to the abuse committed by defendant which lead to Sean’s death, and it was relevant for the purposes stated by the trial court. Accordingly, we overrule defendant’s argument.

II

[2] Next, defendant argues that the trial court erred by allowing Dr. Sharon Cooper to testify that Sean Paddock, along with Hailey, Karen, and Dan Paddock, was the victim of ritualistic child abuse, sadistic child abuse, and torture. Defendant contends that Dr. Cooper’s testimony amounted to inadmissible opinion testimony on the credibility of the juveniles and that Dr. Cooper’s use of the word “torture” was potentially misleading because it differed from the legal definition. We disagree.

Under our Rules of Evidence “[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the

STATE v. PADDOCK

[204 N.C. App. 280 (2010)]

evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.” N.C. R. Evid. 702(a) (2009). However, “our appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence.” *State v. Grover*, 142 N.C. App. 411, 418, 543 S.E.2d 179, 183 (2001) (citation omitted). “Opinion testimony may be received regarding the underlying factual premise, which the fact finder must consider in determining the legal conclusion to be drawn therefrom, but may not be offered as to whether the legal conclusion should be drawn.” *Norris v. Zambito*, 135 N.C. App. 288, 292, 520 S.E.2d 113, 116 (1999) (citation and emphasis omitted). “Expert testimony as to a legal conclusion or standard is inadmissible, however, at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the expert witness.” *State v. Murphy*, 172 N.C. App. 734, 739, 616 S.E.2d 567, 571 (2005) (citing *State v. Jennings*, 333 N.C. 579, 598, 430 S.E.2d 188, 196, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602, 114 S. Ct. 644 (1993)), *vacated in part and remanded on separate issue*, 361 N.C. 164, — S.E.2d — (2006).

[T]he term “torture” is not a legal term of art which carries a specific meaning not readily apparent to the witness. “Torture” does not denote a criminal offense in North Carolina and therefore does not carry a precise legal definition, as “murder” and “rape” do, involving elements of intent as well as acts.

State v. Jennings, 333 N.C. at 599, 430 S.E.2d at 197. “[A] trial court is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony. The trial court’s decision regarding what expert testimony to admit will be reversed only for an abuse of discretion.” *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005) (internal quotations and citations omitted).

Here, Dr. Cooper testified that she reviewed the following: photographs taken of Sean and the remaining Paddock children on the day of Sean Paddock’s death; reports made by the guardian *ad litem*; the emergency room records and medical evaluation assessment made after the examinations of Hailey, Dan, and Randy, as well as the investigative reports by law enforcement; the interviews of Jasmine and Toni Paddock by the State Bureau of Investigation; and the history of the surviving Paddock children taken by Dr. Cooper, herself in November 2007 and April 2008. Based on this data, Dr. Cooper testi-

STATE v. PADDOCK

[204 N.C. App. 280 (2010)]

fied that she found the histories of the older children—Randy, Toni, and Jasmine—very consistent as eyewitnesses to what the younger children described as their experiences. Dr. Cooper further testified to the nature of ritualistic abuse, sadistic abuse, and torture: torture occurs when a person “takes total control and totally dominates a person’s behavior and most the [sic] basic of behaviors are taken control of. Those basic behaviors are eating, eliminating and sleeping. Those are the three more common behaviors that a person will take total control of.” As an example of torture, Dr. Cooper described the act of binding a child at night, placing duct tape over his or her mouth, and then placing furniture atop the child for the purpose of immobilization. Dr. Cooper stated that she was not testifying to a legal definition of torture but was defining the term based on her medical expertise. Dr. Cooper testified that Hailey suffered from sadistic abuse and torture; Karen suffered from sadistic abuse, ritualistic abuse, and torture; and Dan suffered from sadistic abuse and torture. The jury was instructed to consider Dr. Cooper’s testimony for the limited purpose of evidence admitted under Rule 404(b). After the close of the evidence, the trial court instructed the jury that torture was a “course of conduct by one who intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion or sadistic pleasure.”

We hold that Dr. Cooper’s testimony did not amount to inadmissible opinion testimony on the credibility of the Paddock children. *See Norris*, 135 N.C. App. at 292, 520 S.E.2d at 116 (holding that opinion testimony may be received regarding an underlying factual premise but may not be offered as to whether a legal conclusion should be drawn). We hold that the trial court’s admission of Dr. Cooper’s testimony regarding the use of the word “torture” was not an abuse of discretion. *See Jennings*, 333 N.C. at 599, 430 S.E.2d at 197 (“the term ‘torture’ is not a legal term of art which carries a specific meaning not readily apparent to the witness.”). Accordingly, we overrule defendant’s argument.

No error.

Judges ELMORE concur and STROUD concur.

IN RE W.V.

[204 N.C. App. 290 (2010)]

IN THE MATTER OF: W.V.

No. COA09-1568

(Filed 1 June 2010)

1. Child Abuse, Dependency, and Neglect— neglect—sufficiency of findings of fact—environment injurious to child’s welfare

The trial court did not err by its findings of fact supporting its conclusion of law that the child lived in an environment injurious to his welfare and was therefore a neglected juvenile. Unchallenged findings of fact showed, among other things, that respondent grew and consumed an illegal controlled substance in the child’s home, engaged in domestic violence in the child’s presence, and choked the child’s mother to unconsciousness while the child was *in vitro*.

2. Child Visitation— neglect—minimum outline required

The trial court erred in a child neglect case by failing to provide a minimum outline for respondent father’s visitation, and the case was remanded for proceedings to clarify respondent’s visitation rights including the establishment of a minimum outline of visitation.

3. Child Custody and Support— child support—subject matter jurisdiction—insufficient findings of fact

Although the trial court had subject matter jurisdiction and statutory authority under N.C.G.S. § 7B-904(d) to order respondent father to pay child support, the case was remanded for further findings of fact as required by N.C.G.S. §§ 7B-904(d) and 50-13.4(c), and an appropriate child support order based thereupon.

4. Child Abuse, Dependency, and Neglect— neglect—no statutory authority to require father to obtain and maintain stable employment

The trial court lacked statutory authority under N.C.G.S. § 7B-904 in a child neglect case to order respondent father to obtain and maintain stable employment. Nothing in the record suggested that respondent’s employment situation, or lack thereof, led to or contributed to the juvenile’s adjudication.

Judge CALABRIA concurring in part and dissenting in part.

IN RE W.V.

[204 N.C. App. 290 (2010)]

Appeal by respondent from order entered 15 September 2009 by Judge Marvin P. Pope, Jr., in Buncombe County District Court. Heard in the Court of Appeals 29 March 2010.

J. Suzanne Smith for petitioner-appellee.

M. Carridy Bender for guardian ad litem.

Robert W. Ewing for respondent-appellant.

BRYANT, Judge.

Petitioner Buncombe County Department of Social Services filed a juvenile petition on 6 April 2009 alleging that W.V.¹ (hereinafter referred to as “child”) is neglected in that he does not receive proper care, supervision, or discipline from his parents and lives in an environment injurious to his welfare. The child’s mother stipulated to the petition’s allegations and to adjudication of the child as neglected. Respondent refused to stipulate to the allegations and requested a trial. By order filed 15 September 2009, the Buncombe County Superior Court adjudicated the child neglected and placed him in the home of his mother. Respondent appeals. As discussed below, we affirm in part, vacate in part, and remand.

Facts

Respondent has not contested the court’s findings of fact which are therefore deemed binding. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). These findings show the following: The child’s mother and respondent are not married. On 12 September 2008, petitioner received a report that the Buncombe County Sheriff’s Department found a marijuana plant and drug paraphernalia in the residence shared by respondent, the child, and the child’s mother. In response to the report, a social worker visited the family at home. Respondent reported that he smokes marijuana regularly but outside of the house. He also acknowledged that he has a marijuana plant growing in the living room window but felt it was safe from the child’s access because it was protected by a baby gate. The social worker noted that respondent did most of the talking and prevented the mother from responding to questions. When the social worker asked to speak to the mother alone, the maternal great-grandmother positioned herself out of respondent’s line of sight and made a choking gesture. The social worker waited for respondent to return to work

1. Initials have been used throughout to protect the identity of the juvenile.

IN RE W.V.

[204 N.C. App. 290 (2010)]

and spoke privately with the mother, who told her that she did not agree with having the marijuana plant in the home. The social worker also subsequently spoke to respondent's ex-wife, who reported a long history of domestic violence with respondent and that she had ended the marriage because of it.

On 13 October 2008, the mother reported to the social worker that approximately two weeks earlier she told respondent that she wanted to end their relationship and respondent ripped off her clothes and ripped the telephone off the wall. The mother also related that respondent had used the child as a shield as he pushed her repeatedly. She described another incident in which respondent choked her to unconsciousness while she was pregnant with the child. After meeting with the social worker, the mother obtained a domestic violence protective order and moved with the child to a new residence separate from respondent.

On 16 December 2008, a program manager for petitioner spoke to respondent by telephone. During this conversation respondent became verbally abusive, calling the program manager a "bitch," and telling the program manager that she and all of the women at the department were stupid. On 29 December 2008, a social worker spoke to respondent after a supervised visit with the child about completing a case plan and attending domestic violence classes. Respondent refused to sign a case plan or attend any classes and accused DSS of being full of man-haters biased against him because of the prior domestic abuse involving his ex-wife.

Based upon these findings, the court adjudicated the child neglected and directed the child be placed with his mother. The court also ordered respondent to obtain stable employment, to complete a domestic violence education program, to complete a substance abuse assessment and follow all recommendations, to keep two appointments per month with the social worker, to have supervised visitation with the child, to submit to DNA testing to verify paternity of the child, to attend all child and family team meetings, and to pay child support to the mother in the amount of \$100 per month.

Respondent makes six arguments on appeal: (I) the findings of fact did not support the conclusion that the child was neglected under N.C. Gen. Stat. § 7B-101(15); (II) the findings were insufficient to support the visitation order; (III) the visitation order violates the requirements of N.C. Gen. Stat. § 7B-905(c); (IV) the trial court lacked subject matter jurisdiction to order respondent to pay child support;

IN RE W.V.

[204 N.C. App. 290 (2010)]

(V) the findings of fact were insufficient to support the conclusion that respondent pay child support; and (VI) the trial court lacked statutory authority to order respondent to obtain and maintain stable employment. As discussed herein, we affirm in part, vacate in part, and remand.

Standard of Review

When this Court reviews an order in a juvenile abuse, neglect or dependency proceeding, we determine whether the trial court made proper findings of fact and conclusions of law in its adjudication and disposition orders. *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007). In so doing, we consider whether clear and convincing evidence in the record supports the findings and whether the findings support the trial court's conclusions. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). If there is evidence to support the trial court's findings of fact, they are deemed conclusive even though there may be evidence to support contrary findings. *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984). We consider matters of statutory interpretation de novo. *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001), *cert. denied*, 535 U.S. 971, 152 L. Ed. 2d 381 (2002).

I

[1] Respondent first argues the trial court's findings of fact do not support its conclusion of law that the child was neglected. We disagree.

By statutory definition, a neglected juvenile is one "who does not receive proper care, supervision, or discipline from the juvenile's parent" or "who lives in an environment injurious to the juvenile's welfare . . ." N.C.G.S. § 7B-101(15) (2009). "[T]his Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or discipline.' " *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993). "It is well-established that the trial court need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home." *In re T.S., III & S.M.*, 178 N.C. App. 110, 113, 631 S.E.2d 19, 22, *disc. review denied*, 360 N.C. 647, 637 S.E.2d 218 (2006), *aff'd per curiam on other grounds*, 361 N.C. 231, 641 S.E.2d 302 (2007). Our Supreme Court has stated that "severe or dangerous conduct or a pattern of conduct either causing injury or poten-

IN RE W.V.

[204 N.C. App. 290 (2010)]

tially causing injury to the juvenile” may include alcohol or substance abuse by the parent and driving while impaired with a child as a passenger. *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003). This Court has held that exposure of the child to drug use, acts of domestic violence, threatening or abusive behavior toward social workers and police officers, and infliction of injury by a parent to another child or parent, can be conduct causing or potentially causing injury to minors. See *In re D.B.J.*, — N.C. App. —, —, 678 S.E.2d 778, 781 (2009); *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

Here, unchallenged findings of fact show that respondent grew and consumed an illegal controlled substance in the child’s home, engaged in domestic violence in the child’s presence, choked the child’s mother to unconsciousness while the child was *in vitro*, called a social worker by a derogatory word, insulted the intelligence of social workers, raised his voice to social workers, and engaged in domestic violence with a prior spouse. We hold these findings support the conclusion of law that the child lives in an environment injurious to his welfare and is therefore a neglected juvenile.

II, III

[2] Respondent next argues the findings were insufficient to support the visitation order and the visitation order did not adopt an appropriate visitation plan. We hold that the findings support the visitation plan; however, the trial court erred in failing to provide a minimum outline for respondent’s visitation.

“Any dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker . . . shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile’s health and safety.” N.C. Gen. Stat. § 7B-905(c) (2009). This Court reviews the trial court’s decision whether it is in the best interests of the juvenile to award visitation to a parent for an abuse of discretion. *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007). If the court does award visitation to a parent, the order must include an appropriate visitation plan that sets out at least a minimum outline, such as the time, place, and conditions under which visitation may be exercised. *In re E.C.*, 174 N.C. App. 517, 521-23, 621 S.E.2d 647, 651-52 (2005).

Respondent contends the trial court failed to make sufficient findings of fact about both the appropriateness of supervised visitation and a minimum outline of visitation. As to the former, the trial

IN RE W.V.

[204 N.C. App. 290 (2010)]

court found that respondent “demonstrated a complete lack of understanding that his negative attitudes and violent behaviors are unacceptable and have negatively impact [sic] all of his children.” The trial court further found that: respondent has not been consistent with his contact with the child; he has refused to enroll in classes offering assistance and education for the well-being of the child; although respondent states he loves the child, the guardian ad litem (“GAL”) “sees enough instability in the respondent father’s emotional state to give the GAL alarm;” petitioner recommended that it is in the best interest of the child that respondent have weekly visits supervised by petitioner; and the GAL recommended that it is in the best interest of the child that respondent “have supervised, short visits only” with the child. The court adopted petitioner’s recommendation and found that it is in the child’s best interest that respondent have weekly supervised visitation.

We hold these findings support the court’s decision to award weekly visitation under petitioner’s supervision. We find no abuse of discretion. However, nothing in the order establishes a minimum outline of visitation. The order only states that respondent shall have weekly visitations supervised by petitioner. We thus remand for proceedings to clarify respondent’s visitation rights, including the establishment of a minimum outline of visitation. *See In re E.C.*, 174 N.C. App. at 523, 621 S.E.2d at 652.

IV, V

[3] Respondent also argues the trial court lacked subject matter jurisdiction and statutory authority to order respondent to pay child support. We disagree. However, since the trial court failed to make sufficient findings of fact to support the amount ordered, we remand for further findings of fact and an appropriate child support order based thereupon.

Subject matter jurisdiction “refers to the power of the court to deal with the kind of action in question” and “is conferred upon the courts by either the North Carolina Constitution or by statute.” *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). The district court “has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent.” N.C. Gen. Stat. § 7B-200(a) (2009). In this case, DSS filed a juvenile petition with the district court alleging that the child was neglected and dependent. Accordingly, the district court had subject matter jurisdiction over the proceedings and orders at issue.

IN RE W.V.

[204 N.C. App. 290 (2010)]

Pursuant to N.C. Gen. Stat. § 7B-903, dispositional alternatives for an abused, neglected, or dependent juvenile include “placement in the custody of a parent, relative, private agency offering placement services, [] some other suitable person[, or] the department of social services in the county of the juvenile’s residence[.]” N.C.G.S. § 7B-903(2)(b) and (c). A court’s authority to order a parent to pay child support in a dispositional order is derived from N.C. Gen. Stat. § 7B-904(d), which provides that

when legal custody of a juvenile is vested in someone other than the juvenile’s parent, if the court finds that the parent is able to do so, the court may order that the parent pay a reasonable sum that will cover, in whole or in part, the support of the juvenile after the order is entered.

N.C.G.S. § 7B-904(d) (2009) (emphasis added). We interpret the language of § 7B-904(d) as authorizing the trial court to order the parent with whom custody is not vested to pay child support to the *party* granted custody. Thus, where one parent is granted custody of the juvenile, the trial court may order the non-custodial parent to pay child support to the custodial parent. We find support for this reading in the subsection’s use of the phrase “*the* parent” rather than “a parent” or “parents.” Thus, we conclude that the trial court had the statutory authority to order respondent to pay the juvenile’s mother child support.

However, we further conclude the trial court failed to make sufficient findings of fact as required by N.C. Gen. Stat. §§ 7B-904(d) and 50-13.4(c) to support the amount ordered. Pursuant to N.C. Gen. Stat. § 50-13.4(c),

[p]ayments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C.G.S. § 50-13.4(c).

Thus, under N.C.G.S. § 50-13.4(c), “an order for child support must be based upon the interplay of the trial court’s conclusions of law as to (1) the amount of support necessary to ‘meet the reasonable needs of the child’ and (2) the relative ability of the parties to provide

IN RE W.V.

[204 N.C. App. 290 (2010)]

that amount.” *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980). These conclusions must be based upon specific factual findings which indicate to the appellate court that the trial court took “due regard” of the particular “estates, earnings, conditions, [and] accustomed standard of living” of both the child and the parents. *Id.* (quoting N.C.G.S. § 50-13.4(c)). In the absence of such findings, an appellate court has no means of determining whether the order is adequately supported by competent evidence. *Id.*

In this case, finding of fact 14 states that “[i]t is in the best interest of the minor child that . . . respondent father pay child support to the respondent mother in the amount of \$100.00 per month” However, the trial court failed to make any findings concerning the reasonable needs of the child and the relative ability of the father to provide that amount. *Id.* Accordingly, we remand this matter to the district court for further findings of fact and an appropriate child support order based on those findings.

VI

[4] Respondent also argues the court lacked statutory authority to order him to obtain and maintain stable employment. We agree.

A “trial court may not order a parent to undergo any course of conduct not provided for in [N.C. Gen. Stat. § 7B-904].” *In re Cogdill*, 137 N.C. App. 504, 508, 528 S.E.2d 600, 603 (2000). Section 7B-904 provides that a court may order a parent to pay for certain specific treatments, counseling and classes for the child and/or parent, none of which are relevant here. The trial court may also order a parent to “[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile’s adjudication or to the court’s decision to remove custody of the juvenile from the parent.” N.C.G.S. § 7B-904(d1)(3). Nothing in the record suggests that respondent’s employment situation, or lack thereof, led to or contributed to the juvenile’s adjudication. Section 7B-904 does not grant juvenile courts the authority to order a parent to obtain and maintain employment. N.C.G.S. § 7B-904; *see also In re Cogdill*, 137 N.C. App. at 508, 528 S.E.2d at 603 (“Because section 7A-650² does not provide the trial court with authority to order a parent to obtain housing or employment, we modify the trial court’s order to exclude this portion of the order.”). Accordingly, this portion of the order must also be vacated.

2. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. *See now* N.C.G.S. § 7B-904 (2009).

IN RE W.V.

[204 N.C. App. 290 (2010)]

Conclusion

In summary, the trial court's adjudication is affirmed; the portion of the order permitting supervised visitation is remanded for clarification of the visitation plan; the portion of the order requiring respondent to pay child support is remanded for additional findings and entry of an appropriate support order based thereupon; and the portion of the order requiring defendant to obtain and maintain employment is vacated.

Affirmed in part, vacated in part, and remanded.

Judge STEPHENS concurs.

Judge CALABRIA concurs in part and dissents in part in a separate opinion.

CALABRIA, Judge, concurring in part and dissenting in part.

I concur with the portions of the majority's opinion that affirm the trial court's adjudication. I also concur with remanding that portion of the trial court's order permitting supervised visitation for clarification of the visitation plan. However, I respectfully dissent from the portion of the majority's opinion remanding the instant case for additional findings of fact regarding child support. Rather than remand for findings of fact, I would simply vacate the portion of the trial court's order dealing with child support as well as the portion of the trial court's order requiring respondent father to obtain employment. The issues of the appropriate amount of child support and respondent father's employment can ultimately be determined in IV-D Court.

In the instant case, the trial court had the following exchange with respondent mother's counsel:

THE COURT: I would order the father to pay child support for the child. Has that—? That's been set up before, has it not, in IV-D?

[RESPONDENT MOTHER'S COUNSEL]: I don't believe so, Your Honor. I believe that was [inaudible].

THE COURT: Oh, that was different children. Okay. I would ask the mother to go to IV-D and make arrangements for child, child

IN RE W.V.

[204 N.C. App. 290 (2010)]

support enforcement. I would order the father to cooperate with the IV-D child support enforcement agency in making financial contribution to the child. Pending the determination of an appropriate amount I would set a minimum of \$100 per month for child support to be payable by the father to the child.

In its written order, the trial court ordered “[t]hat the respondent father shall pay to the respondent mother for support of the minor child the sum of \$100.00 a month beginning August 1, 2009 and payable on the first of each month thereafter until the respondent mother is able to have this case heard in IV-D court.”

Chapter 110 of our statutes defines a IV-D case as “a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV-D of the Social Security Act as amended and this Article.” N.C. Gen. Stat. § 110-129(7) (2009). The trial court in a IV-D case is empowered to

enter an order for the support of the child by periodic payments, which order may include provision for reimbursement for medical expenses incident to the pregnancy and the birth of the child, accrued maintenance and reasonable expense of the action under this subsection on the affidavit of parentage previously filed with said court.

N.C. Gen. Stat. § 110-132(b) (2009). In addition, “[t]he court may order the responsible parents in a IV-D establishment case to perform a job search, if the responsible parent is not incapacitated.” *Id.*; see also N.C. Gen. Stat. § 50-13.4(b) (2009).

“When determining a child support award, a trial judge has a high level of discretion, not only in setting the amount of the award, but also in establishing an appropriate remedy. However, the court’s discretion is curtailed in IV-D cases in which services involve a child support enforcement agency.” *Guilford Cty. v. Davis*, 177 N.C. App. 459, 460, 629 S.E.2d 178, 179 (2006) (internal quotations and citations omitted).

The trial court in the instant case was ultimately attempting to have the issue of child support resolved by the IV-D court. While I agree with the majority that the trial court erred by attempting to order child support without proper findings pending respondent mother’s institution of a case in IV-D court, I do not believe that it would be appropriate to return this case to the trial court merely for findings. The IV-D court is much better equipped to determine the

TAYLOR v. TOWN OF GARNER

[204 N.C. App. 300 (2010)]

appropriate amount of child support and is statutorily authorized to assist respondent father in obtaining employment. All further action regarding child support needs to occur in IV-D court.

JOHN ALLEN TAYLOR, PLAINTIFF-APPELLEE v. TOWN OF GARNER AND N.C. LEAGUE OF MUNICIPALITIES, DEFENDANT-APPELLANTS, AND N.C. STATE UNIVERSITY AND KEY RISK MANAGEMENT SERVICES, DEFENDANT-APPELLEES

No. COA09-1522

(Filed 1 June 2010)

Workers' Compensation— mutual assistance agreement between town and university police departments— mounted patrol at university football game—town required to pay for injuries

The Industrial Commission did not err in a workers' compensation case by concluding that defendant town was responsible for payment of sums due to plaintiff police officer under the provisions of Chapter 97 of the North Carolina General Statutes. The town and university police departments substantially complied with the requirements of a mutual assistance agreement under N.C.G.S. § 160A-288, and it was undisputed that the officer sustained an injury arising out of and during the course of his employment when he was working as a mounted patrol officer at a university football game with powers to arrest. Further, the parties mutually agreed to the payment arrangement coming directly from the university.

Appeal by defendants Town of Garner and N.C. League of Municipalities from Opinion and Award entered 22 July 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 April 2010.

Patterson Harkavy LLP, by Valerie A. Johnson and Narendra K. Ghosh, for plaintiff-appellee.

Teague Campbell Dennis & Gorham, LLP, by Dayle A. Flammia and Brad G. Inman, for defendant-appellants Town of Garner and N.C. League of Municipalities.

Attorney General Roy Copper, by Assistant Attorney General Marc X. Sneed, for defendant-appellee N.C. State University.

TAYLOR v. TOWN OF GARNER

[204 N.C. App. 300 (2010)]

STEELMAN, Judge.

Where the Garner Police Department and the N.C. State Campus Police Department substantially complied with the requirements of the Agreement pursuant to N.C. Gen. Stat. § 160A-288 and it is undisputed that Officer Taylor sustained an injury arising out of and during the course of his employment on 27 October 2007, the Commission did not err by concluding that Town of Garner is responsible for payment of sums due to plaintiff pursuant to the provisions of Chapter 97 of the North Carolina General Statutes.

I. Factual and Procedural Background

The relevant facts of this case are not in dispute. John Allen Taylor (Officer Taylor) has been employed as a police officer by the Garner Police Department since 1988. In January 2007, Officer Taylor was involved in developing guidelines and training protocols for horses and officers, and subsequently established a volunteer mounted patrol unit for the Town of Garner.

In June 2007, the Garner Police Department and N.C. State Campus Police Department entered into a Mutual Assistance Agreement pursuant to N.C. Gen. Stat. § 160A-288 (Agreement). The Agreement provided that the Garner Police Department and N.C. State Campus Police Department would provide temporary assistance to each other in enforcing the laws of the state when requested. The Agreement further provided that while the officer is temporarily under the command of the requesting agency: (1) the officer shall have the same jurisdiction, powers, rights, and privileges as the requesting agency; and (2) for personnel and administrative purposes, the officer shall remain under the control of the assisting agency and shall be entitled to workers' compensation and other benefits to which he/she would be entitled if he/she was functioning within the normal course and scope of his/her duties with the assisting agency.

On 26 September 2007, Thomas Younce, Chief of the N.C. State Campus Police Department (Chief Younce) contacted Thomas Moss, Chief of the Garner Police Department (Chief Moss) by email and inquired into whether Officer Taylor would be available to work the 29 September 2007 football game at Carter-Finley Stadium on mounted patrol pursuant to the Agreement. Chief Moss approved the request. There was no further communication between Chief Younce and Chief Moss about Officer Taylor working future football games. Sergeant McIver, Officer Taylor's immediate supervisor, emailed Officer Taylor to inform him that the mounted patrol duty had been

TAYLOR v. TOWN OF GARNER

[204 N.C. App. 300 (2010)]

approved, and indicated that he would receive overtime pay and did not need to complete a secondary employment request form.

On 29 September 2007, Officer Taylor reported to Carter-Finley stadium for work. Officer Taylor wore his Garner Police uniform and used equipment provided by the Garner Police Department. Officer Taylor completed tax forms at the request of N.C. State, and was paid \$30.00 per hour for his 12-hour shift directly by the University. Chief Moss approved this payment method because Officer Taylor would make more money for the day's work. N.C. State would take out less taxes and no other deductions would have been required.

Following the first game, Officer Taylor was told by Sergeant McIver to submit a secondary employment request form because he was being paid directly by N.C. State. On 1 October 2007, Officer Taylor submitted this form for the remainder of N.C. State's home football schedule. On 4 October 2007, Sergeant McIver approved the form and, on 29 October 2007, Chief Moss also approved the form.

On 27 October 2007, Officer Taylor reported to Carter-Finley stadium to work the next scheduled football game on mounted patrol. At approximately 6:15 p.m., Officer Taylor and three other mounted officers decided to exercise their horses. Officer Taylor ran his horse in a field that was approximately 100 yards long and had a string of light poles. One pole had a guide-wire attached to it. Officer Taylor did not immediately see the guide-wire. The horse ran under the guide-wire and, upon seeing the wire, Officer Taylor put up his hand to protect his head. The wire caught his left hand, and he was knocked from the horse to the ground. Officer Taylor's left thumb was severed from his hand. He was taken to Rex Hospital and had emergency surgery to reattach his thumb.

The reattachment failed and on 3 December 2007, Officer Taylor's left thumb was amputated at the joint closest to his hand, resulting in the complete loss of his left thumb. Skin was grafted from the inside of his left forearm onto the top of the left thumb. After 7 months, Officer Taylor was able to qualify for his firearm certification and returned to his duties as a patrol officer on 27 May 2008.

All parties have stipulated that Officer Taylor sustained an injury arising out of and during the course and scope of his employment on 27 October 2007. Both the Town of Garner and N.C. State denied Officer Taylor's claim for workers' compensation benefits on the basis that there was no employer-employee relationship at the time of the accident. None of Officer Taylor's medical expenses have been

TAYLOR v. TOWN OF GARNER

[204 N.C. App. 300 (2010)]

paid. The main controversy between the parties is whether Officer Taylor was working at N.C. State on 27 October 2007 pursuant to the Agreement. On 22 July 2009, the Commission entered an Opinion and Award and concluded that Officer Taylor was working on 27 October 2007 pursuant to the Agreement and that the Town of Garner was liable for his compensable injuries pursuant to N.C. Gen. Stat. § 160A-288. Officer Taylor's claims against N.C. State were dismissed with prejudice. Town of Garner and its insurance carrier, N.C. League of Municipalities, appeal. Plaintiff cross-assigns error to the Commission's failure to find, as an alternative basis for its decision, that Town of Garner and N.C. State are both liable for plaintiff's workers' compensation benefits as joint employers.

II. Standard of Review

"Appellate review of an opinion and award from the Industrial Commission is generally limited to determining: '(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact.'" *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (quotation omitted). "[F]ailure to assign error to the Commission's findings of fact renders them binding on appellate review." *Estate of Gainey v. Southern Flooring & Acoustical Co.*, 184 N.C. App. 497, 501, 646 S.E.2d 604, 607 (2007) (citation omitted). We review the Commission's conclusions of law *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

III. Mutual Assistance Agreement

Town of Garner argues that the Commission erred by concluding that Officer Taylor was working on 27 October 2007 pursuant to the Agreement and that it is liable for his compensable injuries because the Town of Garner and N.C. State did not strictly comply with the requirements of N.C. Gen. Stat. § 160A-288. We disagree.

N.C. Gen. Stat. § 160A-288 provides statutory authority for police departments to enter into mutual assistance agreements:

In accordance with rules, policies, or guidelines officially adopted by the governing body of the city or county by which he is employed, and subject to any conditions or restrictions included therein, the head of any law-enforcement agency may temporarily provide assistance to another agency in enforcing the laws of North Carolina if so requested in writing by the head of the requesting agency. The assistance may comprise allowing offi-

TAYLOR v. TOWN OF GARNER

[204 N.C. App. 300 (2010)]

cers of the agency to work temporarily with officers of the requesting agency (including in an undercover capacity) and lending equipment and supplies. While working with the requesting agency under the authority of this section, an officer shall have the same jurisdiction, powers, rights, privileges and immunities (including those relating to the defense of civil actions and payment of judgments) as the officers of the requesting agency in addition to those he normally possesses. While on duty with the requesting agency, he shall be subject to the lawful operational commands of his superior officers in the requesting agency, but he shall for personnel and administrative purposes, remain under the control of his own agency, including for purposes of pay. He shall furthermore be entitled to workers' compensation and the same benefits when acting pursuant to this section to the same extent as though he were functioning within the normal scope of his duties.

N.C. Gen. Stat. § 160-288(a) (2007). On 21 June 2007, the Garner Police Department and the N.C. State Campus Police Department entered into a written agreement pursuant to this statute. The terms of the Agreement mirror the statutory language and outline the responsibilities of each party:

Pursuant to G.S. 160A-288, 160A-288.2 and 90-95.2, as amended, the undersigned do hereby covenant and agree to provide temporary assistance to each other in enforcing the laws of the State of North Carolina when requested in writing to do so and upon approval by the Chief of Police of Garner Police Department or the Chief of Police of NC State Campus Police Department.

....

The terms and conditions of this agreement shall be as follows:

1. As provided by G.S. 160A-288, 160A-288.2, and 90-95.2, either agency may request of the other the temporary lending of personnel, equipment, and supplies.
2. Such request shall be in writing and executed by the Chief of the Requesting Agency, or in his absence, by such other person as has been designated to make or grant such requests. . . .

....

4. While on duty with the Requesting Agency, a law enforcement officer shall be subject to the lawful operational commands of the

TAYLOR v. TOWN OF GARNER

[204 N.C. App. 300 (2010)]

officer in charge of the division to which he is temporarily assigned and shall operate under his direct supervision. . . .

. . . .

8. For personnel and administrative purposes, the temporarily assigned officer shall remain under the control of the Assisting Agency and shall be entitled to Worker's Compensation and other benefits to which he/she would be entitled were he/she functioning within the normal course and scope of his/her duties with the Assisting Agency.

. . . .

12. While on duty, with the Requesting Agency, the temporarily assigned officer of the Assisting Agency shall have the same jurisdiction, powers, rights, privileges, benefits and immunities as the officers of the Requesting Agency in addition to those which he/she normally possesses.

Legislative Intent

The enactment of N.C. Gen. Stat. § 160A-288 serves dual purposes. First, it allows a police officer to temporarily provide assistance to another law enforcement agency and use his powers of arrest outside of his jurisdiction. A criminal defendant may challenge his arrest based upon the law enforcement agencies non-compliance with this statute and argue that the officer was not acting in the course of his official duties as a governmental officer at the time of the incident. *See State v. Locklear*, 136 N.C. App. 716, 721, 525 S.E.2d 813, 816-17 (2000). Officer Taylor's authority to use his powers of arrest outside of his jurisdiction is not the basis of this appeal. Second, the statute seeks to protect the officer's employment benefits, including his workers' compensation benefits. Our analysis focuses solely upon the later of these two purposes.

Town of Garner urges this Court to adopt a very narrow reading of N.C. Gen. Stat. § 160A-288 and hold that the technical written request/approval and pay requirements of N.C. Gen. Stat. § 160A-288 must be strictly complied with in order for the statute to be applicable for *personnel and administrative* purposes. We decline to do so.

The Commission's Findings of Fact

The Commission made the following findings of fact pertaining to the written request/approval and pay requirements of N.C. Gen. Stat. § 160A-288:

TAYLOR v. TOWN OF GARNER

[204 N.C. App. 300 (2010)]

16. Chief Tom Younce of N.C. State University's Police Department contacted Chief Tom Moss of the Garner Police Department by email dated September 26, 2007. He inquired whether Officer Taylor would be allowed to work the September 29, 2007 football game at N.C. State's Carter Finley Stadium on mounted patrol. Chief Younce and Chief Moss, who have known each other for many years, corresponded and agreed that the work Officer Taylor performed would be pursuant to the mutual aid and assistance agreement.

17. Officer Taylor received an email from Sergeant McIver, his direct supervisor, indicating that the mounted patrol duty had been approved and congratulating him on a job well done in developing the unit. Sergeant McIver indicated that Officer Taylor would receive overtime pay and that he did not need to complete a secondary employment application for the work.

18. Officer Taylor worked the N.C. State game on September 29. He was given personnel paperwork to complete at N.C. State and was eventually paid \$30.00 per hour for his 12-hour shift. He did not receive overtime from the Garner Police Department. Chief Moss approved the payment by N.C. State. He believed that the full payment of \$30.00 per hour by N.C. State without payroll deductions from the town of Garner would result in increased payments to Officer Taylor. Chief Moss wanted to compensate Officer Taylor for the increased cost associated with the mounted unit, most of which were born by the mounted officers.

19. Officer Taylor's participation at the game on September 29 demonstrates his deployment was envisioned to permit use of law enforcement powers under the mutual aid agreement as, in addition to providing security at the gate, Officer Taylor responded to a service call involving an assault.

....

21. Although Officer Taylor knew that his work was pursuant to the mutual aid agreement and he had been informed that the Town of Garner would pay him overtime, he was asked to complete a secondary employment request form following the first game. He completed the request noting that he would be working the remainder of the home football games at N.C. State. The request was completed on October 1. Sergeant McIver approved the request form on October 4. Chief Moss wanted Officer Taylor to

TAYLOR v. TOWN OF GARNER

[204 N.C. App. 300 (2010)]

receive as much pay as possible for his work given the amount of money that Officer Taylor was expending for the mounted patrol. The form was not signed by Chief Moss until October 29.

22. It was the understanding of Chief Moss and Chief Younce that all of Officer Taylor's participation at the home football games would be pursuant to the mutual aid and assistance agreement. Chief Younce and Chief Moss had developed a relationship over many years of professional association. Both Chief Moss and Chief Younce understood that his email request before the September 29 game constituted an adequate written request for officers to provide temporary assistance pursuant to the June 2007 mutual aid agreement. No further communication was necessary for future games. At no point did Chief Moss believe that the mutual aid agreement was not in effect, despite the existence of the secondary employment form.

23. If the mutual aid agreement had not been in effect, Officer Taylor would not have been able to work at the October 27 game. In order to use any law enforcement powers, Officer Taylor would have to be lent to N.C. State by the town of Garner Police Department because Carter Finley Stadium is outside of the jurisdiction of the town of Garner. Both Chief Moss and Chief Younce were aware of the necessity of the mutual aid and assistance agreement for Officer Taylor's work.

Town of Garner only assigns error to finding of fact 22. Therefore, findings of fact 16-21 and 23 are deemed to be supported by competent evidence and are binding on appeal. *See Estate of Gainey*, 184 N.C. App. at 501, 646 S.E.2d at 607 (“[F]ailure to assign error to the Commission’s findings of fact renders them binding on appellate review.”). Town of Garner does not argue that finding of fact 22 is not based upon competent evidence, but rather challenges the portion of that finding which states: “[n]o further communication was necessary for future games” and argues that this was inconsistent with the terms of the Agreement.

Clear Intent of the Parties

The Commission’s unchallenged findings of fact establish that on 26 September 2007, Chief Younce inquired into whether Officer Taylor would be available to work the 29 September 2007 football game on mounted patrol. Chief Moss granted this request. Chief Moss and Chief Younce understood that Chief Younce’s request constituted

TAYLOR v. TOWN OF GARNER

[204 N.C. App. 300 (2010)]

a written request for an officer to provide temporary assistance pursuant to the Agreement. As to football games after that date, both Chief Younce and Chief Moss had a clear understanding Officer Taylor was working pursuant to the Agreement. Chief Moss would not have allowed Officer Taylor to work mount patrol at N.C. State absent that Agreement. Officer Taylor also believed that he was working pursuant to the Agreement on 27 October. Officer Taylor completed a secondary employment request form noting that he would be working the remainder of the home football games at N.C. State. Sergeant McIver approved the request form on 4 October. The Commission's unchallenged findings of fact establish that all parties involved were aware of Officer Taylor's employment with N.C. State on 27 October 2007 and believed he was working pursuant to the Agreement.

The intent of the parties is further evidenced by the purpose of Officer Taylor's employment with N.C. State on that day. Unchallenged findings of fact 14 and 15 establish that: (1) mounted patrol officers were necessary at Carter-Finley Stadium during football games because up to 60,000 people can attend and approximately 40,000 people congregate in the parking lots abutting the stadium; and (2) that mounted patrol officers have an improved vantage point, can cover ground quickly, and control crowds effectively.

As the Commission correctly found, in order for Officer Taylor to work as a mounted patrol officer at N.C. State, he would have had to have been working pursuant to the Agreement to have any police powers outside of his jurisdiction. Otherwise, his presence would have served no purpose. The Commission's unchallenged findings of fact establish that the parties clearly intended for Officer Taylor to work the N.C. State football game pursuant to the Agreement.

Method of Payment

Town of Garner also argues that "[a]lthough both appellee and co-defendant NC State University attempted to make light of the fact that appellee was paid directly by NC State, which was inconsistent with the statute, the manner of payment is one of the linchpins of the statute."

We again note that Town of Garner failed to assign error to any findings of fact regarding the method of payment. The Commission's unchallenged findings of fact establish that Chief Moss specifically approved the method of payment in this case. He allowed such a

TAYLOR v. TOWN OF GARNER

[204 N.C. App. 300 (2010)]

method of payment to occur because he believed that the payment of \$30.00 per hour by N.C. State without payroll deductions from the Town of Garner would result in increased payments to Officer Taylor. Chief Moss wanted to compensate Officer Taylor for the amount of money that he was expending for the mounted patrol.

Both plaintiff and Town of Garner argue that the Garner Police Department's past practices with the Chapel Hill Police Department are relevant to show whether the payment method in the instant case was consistent with N.C. Gen. Stat. § 160A-288(a). However, the Commission made no findings of fact or conclusions of law as to this issue. We therefore decline to take this into consideration. *See Bowen v. ABF Freight Sys.*, 179 N.C. App. 323, 330-31, 633 S.E.2d 854, 859 (2006) (“[I]t is not this Court’s role to make new findings of fact based upon the evidence[.]”). The Commission’s unchallenged findings of fact show that the parties mutually agreed to the payment arrangement for Officer Taylor when working mounted patrol at N.C. State football games.

Substantial Compliance

The Commission’s unchallenged and binding findings of fact establish that the parties clearly intended for Officer Taylor to work as a mounted patrol officer with powers of arrest at N.C. State on 27 October 2007 pursuant to the Agreement and explicitly agreed that he would be paid directly by N.C. State. Because the Legislature clearly intended for law enforcement officers to be protected for purposes of workers’ compensation benefits when acting in this capacity, we hold the parties substantially complied with the requirements of N.C. Gen. Stat. § 160A-288(a) for personnel and administrative purposes. The Commission’s unchallenged findings of fact support the Commission’s conclusion of law that on 27 October 2007 Officer Taylor was working pursuant to the Agreement and that Town of Garner is liable for his compensable injury pursuant to N.C. Gen. Stat. § 160A-288.

Based upon the above analysis, we need not address Officer Taylor’s cross-assignment of error.

AFFIRMED.

JUDGES WYNN and CALABRIA concur.

BARE v. ATWOOD

[204 N.C. App. 310 (2010)]

RICHARD R. BARE AND WIFE, HOPE BARE; JERRY L. BARE AND WIFE, DEBORAH BARE; AND DONALD BARE AND WIFE, KATHY BARE, PETITIONERS V. JACQUELINE ATWOOD (WIDOW); PATRICIA “SUSIE” CHURCH, AND HUSBAND, ROBERT CHURCH; DANNY JOE BARE (SINGLE); DAVID RAY BARE AND WIFE, ANGIE BARE; AND DWIGHT TIMOTHY BARE AND WIFE, STEPHANIE BARE, RESPONDENTS

No. COA09-342

(Filed 1 June 2010)

Appeal and Error— interlocutory order and appeal—no substantial right

In an action involving the disposition of real property in accordance with decedent’s will, respondents’ appeal from the denial of their motion to show cause why the clerk of superior court should not be held in contempt was dismissed as from an interlocutory order. The appeal was not brought pursuant to a Rule 54(b) certification and respondents failed to demonstrate that a substantial right would be lost absent immediate appellate review. Respondents incorrectly identified a party as an appellant in this matter and a charge of contempt was not available as a means of enforcement on the facts of this case.

Appeal by respondents from orders entered 7 August 2008 and 15 August 2008 by Judge W. Erwin Spainhour in Ashe County Superior Court. Heard in the Court of Appeals 30 September 2009.

Kilby & Hurley Attorneys at Law, by John T. Kilby, for petitioners-appellees.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Grady L. Balentine, Jr., and Certified Legal Intern Kristin Uicker, for the Honorable Clerk of Superior Court Pamela W. Barlow, appellee.

Ronald D. Alston, for respondents-appellants.

JACKSON, Judge.

Jacqueline Atwood, Patricia “Susie” Church, Robert Church, Danny Joe Bare, David Ray Bare, Angie Bare, Dwight Timothy Bare, and Stephanie Bare (collectively, “respondents”) appeal from the denial of respondents’ motion to show cause why the Honorable Pamela W. Barlow, Ashe County Clerk of Superior Court (“the Clerk”), should not be held in contempt. For the reasons set forth below, we dismiss.

BARE v. ATWOOD

[204 N.C. App. 310 (2010)]

This case arose from Dessie Raye Bare's ("decendent") will. At her death, decendent owned a large tract of land in Ashe County, North Carolina (the "Ashe County Property"). Decendent's will contained a devise that left the Ashe County Property to Richard R. Bare, Jerry L. Bare ("Bare"), and Donald Bare (collectively, "petitioners") subject to certain conditions precedent.

Petitioners initially filed a petition seeking a partition sale of the Ashe County Property with the Ashe County Clerk of Superior Court. On 8 June 2004, the Honorable Jerry Roten, then Clerk of the Ashe County Superior Court, entered an order stating that he did not have jurisdiction to decide the interests that each party held in the Ashe County Property, and, therefore, he was unable to order a partition sale.

Respondents then filed a complaint seeking a declaratory judgment which was decided on 1 November 2005. In that proceeding, the trial court found and concluded, *inter alia*, that (1) the conditions precedent to the devise to petitioners in decendent's will had not been met; (2) the devise, therefore, failed; (3) there was no residuary clause in decendent's will; and (4) therefore, the property was to pass to decendent's heirs pursuant to intestate succession. The trial court then ordered the clerk to continue with the partition proceedings upon the trial court's order that each of decendent's six children had a one-sixth undivided interest in the Ashe County Property. In addition, as one of decendent's children had predeceased her, the four children of her deceased child each were entitled to one fourth of his interest in the Ashe County Property. The trial court also found as fact that, prior to the filing of the partition proceeding, a deed had been executed and recorded in the Ashe County Register of Deeds office conveying any interest that Gloria Voss ("Voss") held in the Ashe County Property to Bare. The declaratory judgment order did not include any findings of fact or conclusions of law clearly addressing the effect of this deed.

Petitioners in the case *sub judice* appealed to this Court from the declaratory judgment order, and we affirmed the trial court's ruling. See *Church v. Bare*, 179 N.C. App. 863, 635 S.E.2d 536, 2006 WL 2947536, 2006 N.C. App. LEXIS 2173 (2006) (unpublished). In *Church*, we addressed the very limited issues presented on appeal, discussed *supra*, which did not include a review of the deed from Voss to Bare or the interests of the parties. See *id.*

Pursuant to our affirmation of the declaratory judgment order upon the limited issues on appeal, the case then returned to the Ashe

BARE v. ATWOOD

[204 N.C. App. 310 (2010)]

County Clerk of Court to determine whether the Ashe County Property would be subject to actual partition, or if it should be partitioned by judicial sale. On 6 February 2007, the Clerk of Court¹ ordered a judicial sale of the Ashe County Property. In that order, the Clerk found as fact that Bare may have acquired Voss's interest in the Ashe County Property. Respondents then moved for a rehearing of the matter and to have the Clerk's order set aside.

The matter was reheard, and on 6 August 2007, the Clerk issued an order setting aside the 6 February 2007 order of judicial sale. In the 6 August 2007 order, the Clerk again noted that a dispute had arisen with respect to the deed that purported to convey Voss's interest in the Ashe County Property to Bare. The Clerk then ordered the parties to mediation and delayed making a decision on the petition for judicial sale pending the outcome of the mediation. The parties went to mediation, but reached an impasse. On 15 October 2007, the Clerk again ordered a judicial sale of the Ashe County Property with the proceeds to be paid to decedent's intestate heirs in accordance with the 1 November 2005 declaratory judgment. However, the Clerk ordered Voss's interest to be deposited into the Ashe County Clerk's Office until a declaratory judgment action was filed or a settlement was reached concerning Voss's interest because "the deed never [was] set aside that conveyed 'all rights, title and interest of Gloria I. Voss and husband Burdette A. Voss to Jerry L. Bare, Individually' (Ashe County Register of Deeds Office book 308 and pages 63-64)."

On or about 14 November 2007, respondents filed for an order to show cause against the Clerk of Court why she should not be held in contempt of court for her failure to follow the 1 November 2005 declaratory judgment order because she ordered Voss's interest in the Ashe County Property to be deposited with the Clerk's Office until the dispute regarding the interest had been resolved. Respondents' motion asked the trial court to order the Clerk to comply with the declaratory judgment order and to have her held liable for attorney fees incurred in "relitigating the matter." On 1 August 2008, the trial court denied respondents' motion on the grounds that the Clerk was immune from suit and charged appellants with \$3,298.33 in costs and fees incurred by the North Carolina Department of Justice in defending her. Respondents appeal.

In their statement of grounds for appellate review, respondents acknowledge the interlocutory nature of their appeal from the trial

1. Prior to 6 February 2007, the Honorable Pamela Barlow had replaced the Honorable Jerry Roten as Clerk of Court in Ashe County.

BARE v. ATWOOD

[204 N.C. App. 310 (2010)]

court's orders that (1) denied respondents' motion seeking to have the Clerk of Court show cause and be held in contempt of court; (2) appointed attorneys Reginald Alston, John T. Kilby, and Carlyle Sherrill "as commissioners for the purpose of conducting the judicial sale of the property which is the subject of this action;" and (3) ordered the remainder of the Clerk's order to remain in effect.

There are two ways by which an interlocutory order may be appealed.

First, an interlocutory order can be immediately appealed if the order is final as to some but not all of the claims . . . and the trial court certifies there is no just reason to delay the appeal [pursuant to North Carolina Rules of Civil Procedure, Rule 54(b)]. Second, an interlocutory order can be immediately appealed under [North Carolina General Statutes, section] 1-277(a) . . . and 7A-27(d)(1) . . . if the trial court's decision deprives the *appellant* of a substantial right which would be lost absent immediate review.

Bartlett v. Jacobs, 124 N.C. App. 521, 524, 477 S.E.2d 693, 695 (1996), *disc. rev. denied*, 345 N.C. 340, 483 S.E.2d 161 (1997) (citations and internal quotation marks omitted) (emphasis added).

The instant appeal is not brought pursuant to a Rule 54(b) certification; therefore, respondents must demonstrate that the trial court's order denied them a substantial right that would be lost absent immediate appellate review. *Id.*

Respondents assert that "Voss, *an appellant in this matter*, levied a charge of contempt to enforce an order affecting a substantial right." (Emphasis added). Respondents contend that a declaratory judgment already had been issued determining Voss's interest in the property, and, therefore, the determination would be barred from relitigation pursuant to North Carolina General Statutes, section 1-301.2(e). Therefore, "appellant has no other avenue to pursue enforcement of the declaratory judgment and protect the right to receive her portion of the proceeds of the sale." Accordingly, respondents argue, the trial court's order affected a substantial right that may serve as grounds for appellate review. We disagree.

Notwithstanding respondents' assertions, Voss is not an appellant in this matter. Although Voss's name appears on the motion for an order to show cause, Voss's name does not appear on (1) either of the challenged orders, (2) the notice of appeal, or (3) the caption of the

BARE v. ATWOOD

[204 N.C. App. 310 (2010)]

appellate record or briefs. Accordingly, without any showing of appellate participation by the purported appellant party, respondents' argument necessarily fails.

Furthermore, respondents incorrectly contend that a charge of contempt was the only means of enforcement available in the case *sub judice*. Contrary to respondents' contention, a charge of contempt is not available as a means of enforcement on these facts.

It long has been recognized that it is " 'a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself.' " *Stump v. Sparkman*, 435 U.S. 349, 355, 55 L. Ed. 2d 331, 338 (1978) (quoting *Bradley v. Fisher*, 80 U.S. 335, 347, 20 L. Ed. 646, 649 (1872)) (alteration in original). Recognizing this principle, our Supreme Court has held that "[a] judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties." *Fuquay Springs v. Rowland*, 239 N.C. 299, 301, 79 S.E.2d 774, 776 (1954); *see also Sharp v. Gulley*, 120 N.C. App. 878, 880, 463 S.E.2d 577, 578 (1995) (court-appointed referee in an equitable distribution matter entitled to judicial immunity), *rev. denied*, 342 N.C. 659, 467 S.E.2d 723 (1996).

Judicial immunity is an absolute immunity from suit, not merely from an ultimate assessment of damages. *Mireles v. Waco*, 502 U.S. 9, 11, 116 L. Ed. 2d 9, 14 (1991). The immunity only can be overridden in two situations: (1) judicial officers are not immune from liability for non-judicial actions, and (2) judicial officers are not immune from liability for actions taken in the "complete absence of all jurisdiction." *Id.* at 11-12, 116 L. Ed. 2d at 14.

The factors to be considered in "determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Stump*, 435 U.S. at 362, 55 L. Ed. 2d at 342. Here, it is undisputed that the Clerk was acting in a judicial capacity in ordering the disputed proceeds representing Voss's interest in the Ashe County Property to be deposited in the Clerk's office until a resolution of the dispute was made.

In her position as the Ashe County Clerk of Superior Court, the Clerk is a "judicial officer of the Superior Court Division" and was "exercis[ing] . . . judicial powers conferred upon [her] by law in

BARE v. ATWOOD

[204 N.C. App. 310 (2010)]

respect of special proceedings” N.C. Gen. Stat. § 7A-40 (2007). Partitions of real property are special proceedings. N.C. Gen. Stat. § 46-1 (2007). The Clerk of Superior Court makes the determination as to whether an actual partition or a sale in lieu of partition is to be conducted. N.C. Gen. Stat. § 1-301.2(h) (2007). The parties in this case brought a number of matters before the Clerk, including the special proceeding that presented the ultimate issue of whether a judicial sale of the Ashe County Property should be ordered. Therefore, in deciding this issue, the Clerk plainly was performing a judicial function because she was acting in her capacity as the Clerk of Court.

Respondents do not dispute that the Clerk’s actions were taken in her judicial capacity. Nevertheless, respondents argue that the Clerk is not entitled to judicial immunity because her decision to have the proceeds representing the disputed interest in the Ashe County Property deposited in the Clerk’s office was contrary to the trial court’s declaratory judgment order and, therefore, was outside of her jurisdiction.

Respondents contend that (1) the 1 November 2005 declaratory judgment order decided not only the issues related to the decedent’s will, but also who was entitled to the Ashe County Property pursuant to the rules of intestate succession, and (2) the dispute between Voss and Bare over Voss’s interest was resolved in favor of Voss as well. We need not address the specifics of what the declaratory judgment order decided because (1) the matter is not squarely before the Court at this time and (2) the relevant standard for judicial immunity is whether the judicial official acted in “the complete absence of all jurisdiction.” *Mireles*, 502 U.S. at 12, 116 L. Ed. 2d at 14.

In the case *sub judice*, the Clerk of Court was not acting in the clear absence of jurisdiction. After we affirmed the declaratory judgment in *Church*, the case returned to the Clerk to determine whether an actual partition or a sale in lieu of partition was appropriate. North Carolina General Statutes, section 1-301.2(h) provides, “the issue whether to order the actual partition or the sale in lieu of partition of real property that is the subject of a partition proceeding . . . shall be determined by the clerk. The clerk’s order determining this issue, though not a final order, may be appealed” N.C. Gen. Stat. § 1-301.2(h) (2007). Thus, the Clerk of Court clearly had jurisdiction to hear the partition proceeding and to order a judicial sale of the Ashe County Property, and respondents had the right to appeal that order.

BARE v. ATWOOD

[204 N.C. App. 310 (2010)]

The United States Supreme Court has illustrated the difference between actions in excess of jurisdiction and actions in the clear absence of all jurisdiction with the following examples:

[I]f a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.

Stump, 435 U.S. at 357, n.7, 55 L. Ed. 2d. at 339 (citing *Bradley*, 80 U.S. at 352, 20 L. Ed. 651). *Cf. Mireles*, 502 U.S. at 10-13, 116 L. Ed. 2d at 13-15 (The Supreme Court noted that a trial court who was angered at a public defender for being absent from the courtroom ordered a bailiff to use excessive force to bring the attorney to the courtroom acted in excess of the court's authority by ordering the use of excessive force, but held that the court's action was not taken in the complete absence of all jurisdiction because the court had jurisdiction over the trial, and having the attorney brought into court was an action taken in aid of that jurisdiction.).

As the foregoing authority makes clear, there is a fundamental difference between exceeding authority and acting in the complete absence of all jurisdiction. In the case *sub judice*, because the Clerk plainly had jurisdiction over partition proceedings, she could not have been acting in the complete absence of jurisdiction even if she ignored or attempted to defy the declaratory judgment order as it related to the disputed interest.

Respondents attempt to circumvent the Clerk's immunity by relying upon *Perry v. Tupper*, 71 N.C. 380 (1874), in which our Supreme Court suggested that a hypothetical judge's refusal to obey an order entered by a higher court would be "judicial insubordination which is not to be tolerated." *Id.* at 381-82. However, this instruction in no way suggests that the proper remedy for judicial insubordination would be to allow contempt proceedings to be commenced against a judicial officer by disgruntled parties to an action.

Respondents also suggest that judicial immunity is inapplicable in this case because it is a contempt proceeding seeking to order the Clerk to comply with the 1 November 2005 declaratory judgment order, rather than a pure action for civil damages. Nonetheless, this

BARE v. ATWOOD

[204 N.C. App. 310 (2010)]

Court previously has noted that “[a] contempt proceeding, *whether civil or criminal*, is *sui generis*, and criminal in nature in that the party who is charged with committing a forbidden act may be punished if found guilty, and that punishment may be awarded only for wilful disobedience.” *Records v. Tape Corp.*, 18 N.C. App. 183, 186, 196 S.E.2d 598, 601, *cert. denied*, 283 N.C. 666, 197 S.E.2d 880 (1973) (citations omitted) (emphasis added).

Were we to accept respondents’ argument, it would undermine the entire purpose of the doctrine of judicial immunity.

“[I]t ‘is . . . for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.’ . . . It is a judge’s duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.”

Stump, 435 U.S. at 368, 55 L. Ed. 2d at 346 (quoting *Pierson v. Ray*, 386 U.S. 547, 554, 18 L. Ed. 2d 288, 294 (1967)).

Accordingly, because the Clerk’s actions immunized her from contempt charges, contempt proceedings were not a means available to respondents to obtain relief in the case *sub judice*. Having addressed respondents’ false premise as a flawed ground for appellate review, and noting respondents’ conspicuous and improper attempt to invoke jurisdiction through a purported appellant who does not appear actually to have appealed, we conclude that respondents’ appeal is interlocutory and should be dismissed for failure to demonstrate a substantial right that will be lost absent immediate review.

Dismissed.

Judges McGEE and STEELMAN concur.

IN RE FORECLOSURE OF ADAMS

[204 N.C. App. 318 (2010)]

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY HANNIA M. ADAMS AND H. CLAYTON ADAMS, DATED OCTOBER 31, 2005, RECORDED IN BOOK 11668, PAGE 2236 IN THE WAKE COUNTY REGISTRY

No. COA09-1455

(Filed 1 June 2010)

Real Property— foreclosure—power of sale—insufficient evidence of assignment of note

The trial court erred in authorizing Monica Walker, Matressa Morris, and Nationwide to act as substitute trustees and proceed with foreclosure under a power of sale of real property owned by respondents. The appointment of the substitute trustees identified Deutsche Bank for Soundview as the owner and holder of the note executed on the property which was originally payable to Novastar, but there was insufficient evidence that the note had been transferred and assigned to Deutsche Bank for Soundview.

Appeal by respondents from order entered 1 June 2009 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 12 April 2010.

Tatum Law Firm, PLLC, by Brian Steed Tatum, for petitioner-appellee.

Brent Adams & Associates, by Cameron V. Frick and Brenton D. Adams, for respondents-appellants.

MARTIN, Chief Judge.

Respondents Hannia M. Adams and H. Clayton Adams appeal from the trial court's order authorizing Monica Walker, Matressa Morris, and Nationwide Trustee Services, Inc. ("Nationwide") to act as substitute trustees and proceed with foreclosure under a power of sale for the property described in the Deed of Trust recorded in Book 11668 at Page 2236 in the Wake County Register of Deeds. We reverse the trial court's order.

On 31 October 2005, respondent Hannia M. Adams executed an adjustable rate note ("the Note") in which she promised to pay a principal amount of \$252,000.00 plus interest to Novastar Mortgage, Inc. ("Novastar"). To secure the loan evidenced by the Note, respondents Hannia M. Adams and H. Clayton Adams executed a Deed of Trust on real property located at 1928 Ridge Road, Raleigh, North Carolina, in

IN RE FORECLOSURE OF ADAMS

[204 N.C. App. 318 (2010)]

which Novastar, a Virginia corporation located in Cleveland, Ohio, was identified as the lender, and Burke & Associates, located in Charlotte, North Carolina, was identified as the trustee. The parties do not dispute that the Note and Deed of Trust provided that respondents' failure to meet their monthly payment obligations would result in default on the loan obligation under the Note, or that respondents' failure to cure such a default could result in a foreclosure under a power of sale on the property secured by the Deed of Trust.

According to the record before this Court, on 7 January 2009, an Appointment of Substitute Trustee was recorded in the office of the Wake County Register of Deeds, which purported to remove Burke & Associates as the original trustee in the Deed of Trust, and sought to appoint Monica Walker, Matressa Morris, and Nationwide as substitute trustees for the Deed of Trust. This Appointment of Substitute Trustee identified Deutsche Bank National Trust Company as trustee for Soundview Home Loan Trust 2005-4 ("Deutsche Bank for Soundview"), located in San Diego, California, as "the owner and holder of the Note" that was originally payable to Novastar and was secured by the Deed of Trust in which Novastar was identified as the lender. One week later, at the "instruct[ion]" of "the owner and holder of the Note," Monica Walker, as purported substitute trustee, filed a petition with the clerk of court in Wake County alleging that respondents defaulted under the terms in the Deed of Trust and requesting a hearing before the clerk in order to "afford the [r]espondent(s) the opportunity to show cause as to why this Court should not allow the foreclosure sale." The Notice of Hearing indicated that "the current holder of the Deed of Trust . . . and the indebtedness secured thereby" is Deutsche Bank for Soundview.

The matter was heard before the Clerk of Wake County Superior Court on 26 March 2009. After considering the evidence presented, the clerk found that Deutsche Bank for Soundview is the holder of the Note, that said Note is now in default, and that "the instrument securing said debt gives the note holder the right to foreclose under a power of sale." Consequently, the clerk authorized the "Substitute Trustee" to proceed with the power of sale foreclosure under the terms of the Deed of Trust. Respondents appealed the clerk's order to superior court.

On 18 May 2009, the matter was heard in superior court. At the proceeding, Wendy B. Cole, the team lead in the foreclosure department for Nationwide, testified over respondents' objection that Deutsche Bank for Soundview is the current holder of the Note and

IN RE FORECLOSURE OF ADAMS

[204 N.C. App. 318 (2010)]

Deed of Trust, and indicated that she was provided with an affidavit from “the lender, Deutsche Bank [for Soundview].” The affidavit was signed by the assistant secretary of Deutsche Bank for Soundview, Cindy A. Smith, who testified by said affidavit that: (1) respondents failed to make payments on the Note beginning on 1 June 2008; (2) “[b]ecause of the default, Lender[—identified as Deutsche Bank for Soundview—]at its option and pursuant to the terms of the Note and Deed of Trust has accelerated and declared the entire balance of the indebtedness to be immediately due and payable”; and (3) “Lender [Deutsche Bank for Soundview] has demanded foreclosure of the Deed of Trust securing the same for the purpose of satisfying the indebtedness according to the terms of the Note and Deed of Trust and has authorized [Nationwide] to act on its behalf in this foreclosure proceeding.” Ms. Smith’s affidavit was introduced into evidence over respondents’ objection, as were photocopies of the original Note and Deed of Trust. The photocopied instruments identified Novastar as the original owner and holder of the Note. Ms. Smith’s affidavit identified Deutsche Bank for Soundview as “the current owner and holder of the Note and Deed of Trust originally executed by [respondent] Hannia M. Adams . . . for the original amount of \$252,000.00 and for the benefit of [Novastar].”

Based on the evidence presented, the superior court found that “the original owner and holder [of the Note], Novastar Mortgage, Inc., . . . transferred and assigned its interest in the Note and Deed of Trust to Deutsche Bank National Trust Company, as Trustee for Soundview Home Loan Trust 2005-4 (‘Lender’), and Chase Home Finance, LLC is the servicer for the Lender.” The court further found that the Note secured by the Deed of Trust was in default and, consequently, authorized Monica Walker, Matressa Morris, and Nationwide to act as substitute trustees and proceed with the foreclosure of the real estate described in the Deed of Trust recorded in Book 11668 at Page 2236 in the Wake County Register of Deeds “in accordance with the terms and provisions of the power of sale contained therein and in accordance with the General Statutes of North Carolina.” Respondents appealed to this Court from the trial court’s order.

“The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court’s findings of fact and whether the conclusions reached were proper in light of the findings.” *In re Foreclosure of Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 50, 535 S.E.2d

IN RE FORECLOSURE OF ADAMS

[204 N.C. App. 318 (2010)]

388, 392 (2000). “Competent evidence is evidence ‘that a reasonable mind might accept as adequate to support the finding.’” *Eley v. Mid/East Acceptance Corp. of N.C.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005) (quoting *Andrews v. Fulcher Tire Sales & Serv.*, 120 N.C. App. 602, 605, 463 S.E.2d 425, 427 (1995)).

“A power of sale is a contractual arrangement in a mortgage or a deed of trust which confer[s] upon the trustee or mortgagee the power to sell the real property mortgaged without any order of court in the event of a default.” *In re Foreclosure of Michael Weinman Assocs.*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993) (alteration in original) (internal quotation marks omitted). “A power of sale provision in a deed of trust is a means of avoiding lengthy and costly foreclosures by action,” whereby “[t]he parties have agreed to abandon the traditional foreclosure by judicial action in favor of a private contractual remedy to foreclose.” *Id.* (internal quotation marks omitted). However, while a power of sale provision is meant to “function as a more expeditious and less expensive alternative to a foreclosure by action,” *In re Foreclosure of Brown*, 156 N.C. App. 477, 486, 577 S.E.2d 398, 404 (2003), “foreclosure under a power of sale is not favored in the law, and its exercise will be watched with jealousy.” *In re Foreclosure of Goforth Props., Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993) (internal quotation marks omitted).

In a foreclosure proceeding under a power of sale, the lender bears the burden of proving four elements that must be established in order for the clerk of court to authorize the mortgagee or trustee to proceed with the foreclosure: “(i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such” *See* N.C. Gen. Stat. § 45-21.16(d) (2009); *In re Foreclosure of Brown*, 156 N.C. App. at 489, 577 S.E.2d at 406 (“In a foreclosure proceeding, the lender bears the burden of proving that there was a valid debt, default, right to foreclose under power of sale, and notice.”). “On appeal from a determination by the clerk that the trustee is authorized to proceed, the judge of the district or superior court having jurisdiction is limited to determining [*de novo*] the same four issues resolved by the clerk.” *In re Foreclosure of Burgess*, 47 N.C. App. 599, 603, 267 S.E.2d 915, 918 (citing *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978)), *appeal dismissed*, 301 N.C. 90 (1980).

In order to find that there is sufficient evidence that the party seeking to foreclose is the holder of a valid debt in accordance with N.C.G.S. § 45-21.16(d), this Court has determined that the following

IN RE FORECLOSURE OF ADAMS

[204 N.C. App. 318 (2010)]

two questions must be answered in the affirmative: (1) “is there sufficient competent evidence of a valid debt?”; and (2) “is there sufficient competent evidence that [the party seeking to foreclose is] the holder[] of the notes [that evidence that debt]?” See *In re Cooke*, 37 N.C. App. 575, 579, 246 S.E.2d 801, 804-05 (1978); *In re Foreclosure of Connolly v. Potts*, 63 N.C. App. 547, 550, 306 S.E.2d 123, 125 (1983) (“A party seeking to go forward with foreclosure under a power of sale must establish, *inter alia*, by competent evidence, the existence of a valid debt of which he is the holder.” (citing N.C. Gen. Stat. § 45-21.16(d); *In re Foreclosure of Burgess*, 47 N.C. App. at 603, 267 S.E.2d at 918). In the present case, respondents did not present argument challenging the trial court’s determination that there existed a valid debt. Instead, the only issue before this Court is whether the trial court erred when it found that Deutsche Bank for Soundview—the party seeking to foreclose—presented competent evidence that it is the current holder of the Note.

This Court has determined that the definition of “holder” in North Carolina’s adoption of the Uniform Commercial Code (“UCC”) is applicable to the term as it is used in N.C.G.S. § 45-21.16 for foreclosures under powers of sale. See *In re Foreclosure of Connolly*, 63 N.C. App. at 550, 306 S.E.2d at 125; *In re Cooke*, 37 N.C. App. at 579-80, 246 S.E.2d at 805. According to the current UCC definition, a “holder” is “[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.” N.C. Gen. Stat. § 25-1-201(21) (2009); *In re Foreclosure of Connolly*, 63 N.C. App. at 550, 306 S.E.2d at 125 (“The Uniform Commercial Code, [then-]G.S. 25-1-201(20) define[d] a ‘holder’ to be ‘a person who is in possession of . . . an instrument . . . issued or indorsed to him or to his order’” (omissions in original) (citing *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 203, 271 S.E.2d 54, 57 (1980))); see also N.C. Gen. Stat. § 25-1-201(27) (“‘Person’ means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, . . . or any other legal or commercial entity.”).

Respondents first contend Deutsche Bank for Soundview did not present competent evidence that it had possession of the Note and Deed of Trust because it offered only photocopies of the Note and Deed of Trust, rather than the original instruments.¹ However, in *In*

1. Since no testimony or evidence was presented at trial to suggest that either the original Note or Deed of Trust was lost or destroyed, and since the trial court made no such findings, we do not consider the parties’ arguments with respect to this issue.

IN RE FORECLOSURE OF ADAMS

[204 N.C. App. 318 (2010)]

re Foreclosure of Helms, 55 N.C. App. 68, 284 S.E.2d 553 (1981), *disc. review denied*, 305 N.C. 300, 291 S.E.2d 149 (1982), this Court determined that the trial court did not err when it did not require the party seeking to foreclose under a power of sale to present the original promissory note and deed of trust, but instead admitted into evidence photocopies of the instruments, *see In re Foreclosure of Helms*, 55 N.C. App. at 70, 284 S.E.2d at 554-55 (stating that the “best evidence” rule was inapplicable because, “[w]hen the opposing party . . . admits that the documents shown him are correct copies of the original, [as was the case in *In re Foreclosure of Helms*,] the original need not be produced”), and determined that the photocopies of the promissory note and deed of trust were sufficient competent evidence to establish the required elements under N.C.G.S. § 45-21.16(d). *See id.* at 70-71, 284 S.E.2d at 555 (“Since the note and deed of trust were properly admitted, . . . there is ample evidence to support the [trial] court’s findings that respondents had executed a deed of trust, that the deed of trust secured a valid debt evidenced by a note payable to [the party seeking to foreclose], and that there had been default in the payment of indebtedness.”).

Respondents in the present case admit that “[t]here is no evidence that the copies of the Note and Deed of Trust referred to in the affidavit were not the exact reproductions” of the original instruments. Because respondents do not dispute that the photocopies are “correct copies” of the original instruments, we conclude that Deutsche Bank for Soundview was not required to present the original Note and Deed of Trust at the foreclosure hearing to establish that it was in possession of these instruments. Nevertheless, while “[i]t is the fact of possession which is significant in determining whether a person is a holder, and the absence of possession defeats that status,” *see In re Foreclosure of Connolly*, 63 N.C. App. at 550, 306 S.E.2d at 125, “[m]ere possession” of a note by a party to whom the note has neither been indorsed nor made payable “*does not suffice* to prove ownership or holder status.” *See Econo-Travel Motor Hotel Corp.*, 301 N.C. at 203, 271 S.E.2d at 57 (emphasis added). Thus, since the photocopies of the Note and Deed of Trust presented to the trial court indicate that the original holder of both instruments was Novastar, not Deutsche Bank for Soundview, and since these photocopies do not indicate that Novastar negotiated, indorsed or transferred the Note to Deutsche Bank for Soundview, respondents contend the photocopied instruments alone were not sufficient to establish that Deutsche Bank for Soundview is the current holder of the Note. *Cf. In re Foreclosure of Helms*, 55 N.C. App. at 69-70, 284 S.E.2d at 554

IN RE FORECLOSURE OF ADAMS

[204 N.C. App. 318 (2010)]

(indicating that the party seeking to foreclose by power of sale and the party named as the original lender and holder of the note and deed of trust were one and the same, and so concluding that the photocopies of the original instruments were sufficient competent evidence to support the trial court's findings, including its finding that the party seeking to foreclose was the holder of the Note).

Nonetheless, respondents concede that this Court has upheld the use of affidavits as competent evidence to establish the required statutory elements in *de novo* foreclosure appeal hearings. *See In re Foreclosure of Brown*, 156 N.C. App. at 486-87, 577 S.E.2d at 404-05 (concluding that the affidavit, along with the note and deed of trust, "constitute[d] sufficient competent evidence of a valid debt and default" when requiring an out-of-state lender and an out-of-state servicer of a mortgage loan to present "live witness testimony, through a corporate officer or employee, at the hearing as to the existence of the statutory foreclosure elements would frustrate the ability of . . . [a] deed of trust's power of sale provision to function as a more expeditious and less expensive alternative to a foreclosure by action"). We recognize that, in the present case, the testimony by affidavit from Ms. Smith,² the assistant secretary of Deutsche Bank for Soundview—an out-of-state entity—as well as the in-person testimony offered by Ms. Cole indicated that Deutsche Bank for Soundview is the current holder of the Note and Deed of Trust. However, neither the in-person testimony from Ms. Cole nor the testimony by affidavit from Ms. Smith expressly showed that Novastar transferred or assigned its interest in the Note and Deed of Trust to Deutsche Bank for Soundview. Moreover, as we discussed above, the photocopied Note and Deed of Trust, which were described in Ms. Smith's affidavit as "exact reproductions" of the original instruments, do not show that the Note was indorsed, transferred, or otherwise made payable by Novastar, the original holder of the instrument, to Deutsche Bank for Soundview. Thus, whereas the record in *In re Foreclosure of Brown*, 156 N.C. App. 477, 577 S.E.2d 398 (2003), also included an Assignment of Deed of Trust as evidence showing that the original holder of the note and deed of trust had assigned its interest in said instruments to the party seeking to foreclose on the respondent-borrowers, the record before the trial court in the present

2. Since respondents made no objection to the court's admission of Ms. Smith's affidavit on the grounds that Ms. Smith lacked the personal knowledge necessary to testify by affidavit on the matters contained therein, respondents' argument on this issue is not properly before us and we do not address it. *See* N.C.R. App. P. 10(b) (amended Oct. 1, 2009).

DEMERITT v. SPRINGSTEED

[204 N.C. App. 325 (2010)]

case contained no such additional evidence. Accordingly, because a foreclosure under a power of sale is not favored in the law and must be “watched with jealousy,” *see In re Foreclosure of Goforth Props.*, 334 N.C. at 375, 432 S.E.2d at 859 (internal quotation marks omitted), we must conclude that the evidence presented to the trial court was not sufficient to establish that the Note was payable to Deutsche Bank for Soundview, and so was not sufficient to support the trial court’s finding of fact that “Novastar Mortgage, Inc., . . . transferred and assigned its interest in the Note and Deed of Trust to Deutsche Bank National Trust Company, as Trustee for Soundview Home Loan Trust 2005-4 (‘Lender’).” *See, e.g., Smathers v. Smathers*, 34 N.C. App. 724, 725, 239 S.E.2d 637, 638 (1977) (“The notes upon which plaintiff sued were not drawn, issued or indorsed to her or to her order or to bearer or in blank. Therefore, plaintiff is not the holder of the notes within the meaning of the Uniform Commercial Code, G.S. Ch. 25, and the trial court erred in according her the rights of a holder under G.S. 25-3-301.”); *see also Econo-Travel Motor Hotel Corp.*, 301 N.C. at 203-04, 271 S.E.2d at 57 (holding that, where a promissory note “had never been made payable to plaintiff or to bearer, nor had it ever been indorsed to plaintiff, . . . defendants established that plaintiff was not the owner or holder of the note”). Therefore, we reverse the trial court’s order authorizing Monica Walker, Matressa Morris, and Nationwide to act as substitute trustees and proceed with foreclosure under a power of sale for the property described in the Deed of Trust recorded in Book 11668 at Page 2236 in the Wake County Register of Deeds.

Reversed.

Judges JACKSON and BEASLEY concur.

MICHAEL ALMON DEMERITT AND CAROLYN P. DEMERITT, PLAINTIFFS v.
JOHN K. SPRINGSTEED, DEFENDANT

No. COA09-1075

(Filed 1 June 2010)

Real Property— failed closing—conditions precedent in contract—not waived

The trial court correctly granted defendant’s motion for summary judgment in an action arising from the failure of a real estate closing and a subsequent sale for a lesser amount. There

DEMERITT v. SPRINGSTEED

[204 N.C. App. 325 (2010)]

was no dispute that conditions precedent in the contract were not satisfied; while plaintiff contended that defendant waived the conditions, defendant demonstrated that he wanted the sale to go through and that the conditions precedent were not satisfied due to external factors.

Appeal by plaintiffs from judgment entered 4 March 2009 by Judge Richard L. Doughton in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 February 2010.

James, McElroy & Diehl, P.A., by John R. Buric and Jon P. Carroll, for plaintiffs.

DeVore, Acton & Stafford, PA, by Fred W. DeVore, III, for defendant.

ELMORE, Judge.

On 26 April 2006, Michael and Carolyn Demeritt (plaintiffs) entered into a contract with John Springsteed (defendant), agreeing to sell property in Charlotte to defendant. The parties signed an agreement for purchase and sale of real property, which specified that the closing would occur

on or before August 31, 2006 or upon approval by the proper zoning, planning, and governing bodies of a plan to create at least 3 lots with city water and city sewer, gas, electric, storm drain, sidewalks, and retention basins along with other such requirements imposed by the planning commission, Mecklenburg County, and the City of Charlotte.

Defendant told plaintiffs that he planned to close on the property on 31 August 2006. He explained his plan to incorporate plaintiffs' property into a larger, overall development plan that would include property owned by another landowner that was contiguous with plaintiffs' property. Under the development plan, defendant would subdivide plaintiffs' property for residential use. These intentions to subdivide and sell to a developer were part of the contract. Defendant encouraged plaintiffs to relocate by 31 August. Plaintiffs did find a new home, and they scheduled the closing on their new home on 31 August, the same day that they intended to close on the property with defendant.

In the meantime, defendant worked to get approval for the development by the planning commission, Mecklenburg County, and the

DEMERITT v. SPRINGSTEED

[204 N.C. App. 325 (2010)]

City of Charlotte, but he was unable to obtain the necessary permits. As a result, defendant sent notice of his intention to terminate the contract to both plaintiffs and their real estate agent in a letter dated 2 August 2006. In his letter to plaintiffs, defendant asked plaintiffs to sign the termination of contract form and return one copy to him. Defendant received no response; plaintiffs claim they did not receive this letter. Plaintiffs' real estate agent, however, acknowledges receipt of a copy of the termination of contract form. Upon receiving the termination notice, the real estate agent immediately mailed it to plaintiffs. Defendant sent another letter to plaintiffs and their realtor dated 11 August 2006. Again, plaintiffs claim that they never received this letter.

When the deal fell through, plaintiffs put their property on the market, and they ultimately sold it for a lower price than the price that defendant had agreed to pay for it. Plaintiffs sued defendant to recover damages associated with this loss.

Plaintiffs filed their complaint on 13 February 2008, alleging claims for breach of contract, fraud, and unfair trade practices arising out of their failed real estate transaction with defendant. Defendant filed an answer, in which he denied the allegations, and defendant also filed a motion for judgment on the pleadings. The trial court denied defendant's motion on 16 September 2008.

In February 2009, about a month before the trial was scheduled to begin, defendant filed an untimely motion for summary judgment. On 3 March 2009, the parties appeared before the trial court for a pre-trial conference, during which they agreed that, in the interest of judicial economy, defendant's motion for summary judgment should be heard. Plaintiffs asked to file affidavits in opposition to defendant's motion, and the court granted permission. The hearing was scheduled for the next day.

Before the hearing, plaintiffs filed affidavits in opposition to the motion for summary judgment and voluntarily dismissed, without prejudice, their claims for fraud and unfair trade practices. The trial court considered the motion for summary judgment at the hearing, and it granted summary judgment in defendant's favor. Plaintiffs now appeal.

Plaintiffs argue that the trial court committed reversible error by granting defendant's motion for summary judgment because the pleadings, discovery materials, and affidavits raised a genuine issue of material fact concerning defendant's breach of contract.

DEMERITT v. SPRINGSTEED

[204 N.C. App. 325 (2010)]

Specifically, plaintiffs argue that defendant acted in ways to represent to plaintiffs that defendant had voluntarily and intentionally relinquished his right to rely on the agreement's conditions precedent to closing. There were three relevant conditions precedent in this contract: (1) Section 1(c) of the contract conditioned the closing on approval in writing of defendant's development plan by the planning commission, Mecklenburg County, and the City of Charlotte. (2) Section 1(g) made the contract conditioned "upon closing property owned by Webb next door on Sharonview." (3) Section 6(d) of the contract made the closing conditioned on the approval of defendant's "Intended Use," which may not violate any private restriction or governmental regulations.

"When reviewing a lower court's grant of summary judgment, our standard of review is *de novo*." *Finova Capital Corp. v. Beach Pharmacy II, Ltd.*, 175 N.C. App. 184, 187, 623 S.E.2d 289, 291 (2005) (citation omitted). When considering a motion for summary judgment, a court must consider the evidence in a light most favorable to the non-moving party. *Id.* at 187, 623 S.E.2d at 291 (citation omitted). Moreover, a court must deny a motion for summary judgment "if there is any issue of genuine material fact." *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972) (citations omitted); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009).

As outlined above, there were three relevant conditions precedent present in this contract. Defendant asserts, and plaintiffs do not dispute, that these conditions were not met: defendant was not able to receive approval in writing for the development project by the planning commission, Mecklenburg County, and the City of Charlotte; the neighboring property was not bought; and the Planning Commission failed to approve defendant's proposed subdivision and advised defendant that the proposal would likely be in conflict with private covenants, conditions, and restrictions on the surrounding properties.

Plaintiff does not dispute that these conditions precedent were not satisfied, but instead plaintiff argues that defendant waived the conditions in the agreement by his conduct. It is well settled in North Carolina that a "party may waive a contractual right by any intentional and voluntary relinquishment." *McNally v. Allstate Ins. Co.*, 142 N.C. App. 680, 683, 544 S.E.2d 807, 809-10 (2001) (citation omitted). "The essential elements of waiver are (1) the existence, at the time of the alleged waiver, of a right, advantage or benefit; (2) the knowledge, actual or constructive, of the existence thereof;

DEMERITT v. SPRINGSTEED

[204 N.C. App. 325 (2010)]

and (3) an intention to relinquish such right, advantage or benefit.” *Fetner v. Granite Works*, 251 N.C. 296, 302, 111 S.E.2d 324, 328 (1959) (citation omitted).

“The intention to waive may be expressed or implied from acts or conduct that naturally lead the other party to believe that the right has been intentionally given up.” *Klein v. Insurance Co.*, 289 N.C. 63, 68, 220 S.E.2d 595, 599 (1975). For example, this Court held that a party may waive a condition precedent by performing on the contract despite knowledge that a condition has not occurred. *Fletcher v. Jones*, 314 N.C. 389, 333 S.E.2d 731 (1985). In *Fletcher*, the plaintiff-purchaser and defendant-seller entered into a contract for the sale of land. *Id.* at 390, 333 S.E.2d at 733. A specific closing date was listed in the agreement, but the defendant continued to assure the plaintiff of his intentions to sell even five months after this date had passed. *Id.* at 390-91, 333 S.E.2d at 733. After repeated assurances that the defendant would sell the property to the plaintiffs, the defendant returned the earnest money along with a letter stating that the contract was null and void. *Id.* at 391-92, 333 S.E.2d at 733. The defendant then sold the property to a third party. *Id.* at 391, 333 S.E.2d at 733. Plaintiff sued for specific performance and special damages. *Id.* at 392, 333 S.E.2d at 734. The trial court granted specific performance and denied special damages. *Id.* The Supreme Court affirmed, explaining: “oral representations and assurances by defendant to plaintiff of defendant’s willingness to perform subsequent to [the specified closing date] indicated an intent on defendant’s part to waive the [specified closing date] and further extend the time in which the parties could perform.” *Id.* at 394, 333 S.E.2d at 735.

Plaintiff argues that the following actions taken by defendant constituted waiver:

subsequent to the parties’ execution of the Agreement, Defendant repeatedly told Plaintiffs that he intended to purchase the Property; that closing would occur on 31 August 2006; that another, third-party buyer intended to develop the Property along with a neighboring tract; and that Plaintiffs needed to “be out” of the home no later than the 31 August 2006 closing date to accommodate the larger development plan.

An essential element of waiver is the intention to relinquish a right. For example, the defendant in *Fletcher* demonstrated his intention to waive the closing date by continuing to assure the plaintiff that he wanted to go through with the transaction in the five months after the original closing date. Here, defendant verbalized his intention to

DEMERITT v. SPRINGSTEED

[204 N.C. App. 325 (2010)]

purchase the property by 31 August, reinforcing the agreement as written. Additionally, defendant acted in accordance with the contract by seeking approval for his development plan from the city and county. Plaintiff points only to evidence that defendant acted in accordance with the written agreement; plaintiff has demonstrated no contradictory intentions or actions. Therefore, defendant did not waive any right.

Plaintiffs rely on *Bone International, Inc. v. Johnson* in their argument. 74 N.C. App. 703, 329 S.E.2d 714 (1985). In *Bone*, a truck dealer sold two trucks to the defendant and signed an agreement in which there were no express or implied warranties on the trucks. *Id.* at 705, 329 S.E.2d at 716. Later, the defendant threatened to cancel the sale because he learned that the trucks' engines were faulty. *Id.* at 705-06, 329 S.E.2d at 716. The dealership told the defendant that the dealership would repair any faulty engines at no cost, so the defendant followed through with the sale. *Id.* When the trucks' engines did have problems, the dealership repaired them and billed the defendant for the work. *Id.* The defendant refused to pay, and the dealership sued to recover the repair costs. *Id.* at 705, 329 S.E.2d at 716. The dealership filed a motion for summary judgment, which the trial court granted. *Id.* However, this Court reversed the trial court's order because the alleged oral modification of the contract "raises a statutory defense to plaintiff's suit and so creates a genuine issue of material fact, precluding summary judgment." *Id.* at 707, 329 S.E.2d at 717. Neither party raised the issue of waiver.

Plaintiffs argue that *Bone* is analogous to this case, but we disagree. In *Bone*, the parties modified the contract orally in a way that contradicted the written contract terms. Here, however, defendant acted in ways that reinforced the intention of the parties and the contract; defendant did not act in a way that contradicted the written agreement.

Plaintiffs also argue that defendant was in a unique position to either ensure that the conditions were met or to waive them. They further argue that this unique position is significant to the analysis of waiver. Plaintiffs point to *Burden Pallet Co. v. Truck Rental, Inc.*, to support this argument. 49 N.C. App. 286, 271 S.E.2d 96 (1980). Plaintiffs have drawn incorrect inferences from *Burden Pallet*. In *Burden Pallet*, the plaintiff signed a contract with the defendant for sale of a tractor. *Id.* at 287, 271 S.E.2d at 97. The defendant did not sign the contract, though this was unclear to the plaintiff. *Id.* Meanwhile, both parties acted in compliance with the contract: the

DEMERITT v. SPRINGSTEED

[204 N.C. App. 325 (2010)]

defendant provided a tractor to the plaintiff while accepting payments from the plaintiff under the terms of the contract. *Id.* at 289, 271 S.E.2d at 98. The defendant enjoyed the benefits of the contract, but then later refused to perform his obligations under the contract. *Id.* at 290, 271 S.E.2d at 98. Defendant argued that the unsigned contract was unenforceable. *Id.* at 289, 271 S.E.2d at 97. The trial court granted a directed verdict to the defendant on the basis of an unsigned and, thus, unenforceable, contract. *Id.* This Court vacated the trial court's grant of directed verdict and remanded on the issue of whether the contract was enforceable. *Id.* at 289-90, 271 S.E.2d at 97-98.

This Court did not vacate the directed verdict based on the defendant's unique position, as stated by plaintiffs. Instead, this Court vacated the directed verdict based on the "acts and conduct by the defendant" including the fact that the defendant provided the plaintiff with a tractor and accepted payments according to the contract terms. *Id.* at 290, 271 S.E.2d at 98. By complying with the contract and by not telling the plaintiff that he did not sign the contract, the defendant lost his right to later claim the contract was unenforceable. *Id.*

Burden Pallet is distinguishable from the present case. Here, both parties signed and acted in accordance with the written agreement. Neither party benefitted from the contract while avoiding contractual obligations as the Court warned against in *Burden Pallet*. *Id.* at 290, 271 S.E.2d at 98. Defendant acted in accordance with the contract when he sought project approval by the planning commission, Mecklenburg County, and the City of Charlotte. Though defendant was not granted approval for his subdivision, this does not represent a waiver. Additionally, when the neighboring land was not sold, it was not because defendant acted in a way that contradicted the terms of the contract. Defendant demonstrated that he wanted the sale to go through, but due to external factors the conditions precedent were not satisfied.

Defendant's actions and intentions do not contradict the written agreement. Therefore this Court cannot find that he waived his rights. Accordingly, we hold that summary judgment was proper, and we affirm the trial court's decision.

Affirmed.

Judges STEELMAN and JACKSON concur.

DUNN v. COOK

[204 N.C. App. 332 (2010)]

THOMAS DUNN, PLAINTIFF v. ALFRED W. COOK, JR., INDIVIDUALLY; AND ALFRED W. COOK, JR., TRUSTEE OF THE LAVOLA CARENDER LIVING TRUST, DEFENDANTS

No. COA09-478

(Filed 1 June 2010)

Parties— necessary—trust beneficiaries—change of venue

A change of venue order in a trust action was reversed where the remainder beneficiaries of the trust, who were not initially included, were necessary parties because they would be affected by the adjudication of the action. The change of venue was not addressed on appeal because the remainder beneficiaries may also have interests in regard to venue which are properly addressed after they have been joined in the action.

Appeal by plaintiff from order entered on or about 5 December 2008 by Judge Kenneth Titus in Superior Court, Durham County. Heard in the Court of Appeals 15 October 2009.

Thomas, Ferguson & Mullins, L.L.P., by Jay H. Ferguson, for plaintiff-appellant.

Hemphill Law Firm, PLLC, by Kathryn G. Hemphill, for defendants-appellees.

STROUD, Judge.

Thomas Dunn (“plaintiff”) appeals from an order granting the motion of Alfred W. Cook, Jr., individually and as trustee of the Lavola Carender Living Trust (referred to collectively as “defendants”), to remove this action from Durham County to Watauga County. As the remainder beneficiaries of the trust are necessary parties to this action, we reverse the order of the trial court allowing the change of venue and remand to the Superior Court of Durham County for further proceedings.

I. Background

Lavola Carender established the Lavola Carender Living Trust (“the trust”) in 1994 and transferred all of her real and personal property to the trust. On 21 December 2004, Ms. Carender executed a restatement of the Trust (“2004 Restatement”), which appointed Alfred W. Cook, Jr. as co-trustee. The 2004 Restatement, in Article 8, Section 8.01, provided that the trust property remaining after the Grantor’s death would be distributed as follows:

DUNN v. COOK

[204 N.C. App. 332 (2010)]

a. I direct my Trustee to distribute my home and 24.11 acres, being Tax Parcel #1869-99-2662-000 [referred to hereinafter as ‘the Watuaga County land’] to THOMAS DUNN of Elizabeth City, NC. In the event THOMAS DUNN is not living, then my home and 24.11 acres shall be distributed to ALFRED W. COOK, JR.

b. The remaining trust property shall be distributed as follows:

1. 35% to the Lavola and Mary Launa Carender Scholarship Fund at Appalachian State University, Boone, NC.
2. 35% to the Lavola and Mary Launa Carender Scholarship Fund at Lees-McRae College, Banner Elk, NC.
3. 10% to the North Carolina Baptist Foundation, Inc.
4. 10% to The Baptist Children[']s Homes of North Carolina.
5. 10% to The Cannon Hospital Foundation of Banner Elk, NC.

We will refer to the charitable beneficiaries listed under paragraph (b) above as the “remainder beneficiaries.”

On 4 August 2005, defendants and Ms. Carender executed a “First Amendment of the Lavola Carender Living Trust” (“2005 Amendment”) which modified the 2004 Restatement. The modifications relevant to this appeal changed Article 8, Section 8.01 of the 2004 Restatement, dealing with the distribution of the remaining trust property, as follows:

a. Prior to conveying any interest in real property to the beneficiaries set forth below,¹ I direct that the Trustee take all necessary steps to convey a conservation easement to a reputable organization which shall effectively preserve the property as farmland and prevent any commercial development and any residential development of more than three (3) homes.

b. I direct that **Thomas Dunn** of Elizabeth City, NC be given the right of first refusal to purchase any and all interest in my home and 24.11 acres, subject to a conservation easement as described above, being Tax Parcel #1869-99-2662-000, at fair market value,

1. The “beneficiaries set forth below” include Thomas Dunn and Alfred W. Cook, Jr., as stated in subparagraph (b). However, the remainder beneficiaries are all set forth in the next subparagraph, which is the original subparagraph (b) in the 2004 Restatement quoted herein above. The 2005 Amendment eliminates “subparagraph a. of Article 8 [of the 2004 Restatement] in its entirety” and substitutes subparagraphs (a) and (b) quoted here “in lieu thereof.”

DUNN v. COOK

[204 N.C. App. 332 (2010)]

said right of first refusal to expire thirty (30) days from date notice is given to Mr. Dunn. In the event **Thomas Dunn** does not exercise his right of first refusal to purchase said property at fair market value, or he is not living, then I direct my Trustee to distribute my home and 24.11 acres to **Alfred W. Cook, Jr.**

The percentage interests in the trust estate to be distributed to the remainder beneficiaries under the 2005 Amendment remained the same as under the 2004 Restatement.

Ms. Carender passed away in 2007. Plaintiff, a resident of Durham County, filed a complaint against defendants seeking to rescind the 2005 Amendment on 30 May 2008. Plaintiff alleged that defendant Cook procured execution of the 2005 Amendment by constructive fraud, breach of fiduciary duty, breach of duty of loyalty, and undue influence. The complaint alleged that venue was proper in Durham County. Plaintiff requested the following relief:

1. For an order rescinding and setting aside the First Amendment of the Lavola Carender Living Trust;
2. For an order directing Alfred W. Cook, Jr., trustee, to comply with Section 8.01 of the Restatement of Trust Agreement;
3. In the alternative, to enter judgment against Alfred W. Cook, Jr., individually, in an amount in excess of \$10,000;
4. For costs, interest, attorney fees and for such other relief as the Court deems just and proper; and
5. For a trial by jury.

Before defendants filed an answer, they filed a motion to remove the action for improper venue (“motion to remove”) pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. §§ 1-76 and 1-83. The trial court granted defendants’ motion to remove and transferred the action from Durham County to Watauga County, North Carolina without specifying under which provision it ruled. From this order, plaintiff appeals.

II. Necessary Parties

Although neither party has raised the issue of whether all of the remainder beneficiaries of the trust are necessary parties to this action under N.C. Gen. Stat. § 1A-1, Rule 19, this question must be addressed first. It is appropriate, and indeed necessary, for us to raise this issue *ex mero motu*, because if

DUNN v. COOK

[204 N.C. App. 332 (2010)]

a fatal defect of parties is disclosed, the Court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the Court. *See also: Edmondson v. Henderson*, 246 N.C. 634, 99 S.E.2d 869; *Peel v. Moore*, 244 N.C. 512, 94 S.E.2d 491.

Wall v. Sneed, 13 N.C. App. 719, 723, 187 S.E.2d 454, 456-57 (1972) (quotation marks omitted). Although at first glance it may appear that the interests of the remainder beneficiaries would not be affected by the determination of this case, as the Watauga County land would not be distributed directly to the remainder beneficiaries under either the 2004 Restatement or the 2005 Amendment, upon closer examination, it is apparent that the interests of the remainder beneficiaries are implicated. In fact, defendant's motion to remove actually identifies these beneficiaries and states that "these contingent beneficiaries may be adversely affected by this litigation." If plaintiff's claim fails and the 2005 Amendment is held to be enforceable, plaintiff would have the option to purchase the Watauga County land at fair market value, and these funds would be paid to the trust. The funds in the trust would then be distributed to the remainder beneficiaries, thus increasing the amount which would be paid to each remainder beneficiary. If plaintiff prevails on his claim and the 2005 amendment is set aside, the trust estate distributable to the remainder beneficiaries is decreased by the fair market value of the Watauga County land, as the land would be distributed to plaintiff without payment. Thus, in this way, the 2005 Amendment potentially increases the value of the trust property which will be distributed to each remainder beneficiary. The 2005 Amendment could also affect the value and use of all of the real property distributed from the trust to the remainder beneficiaries. The 2005 Amendment appears to require conservation easements limiting the use of any real property conveyed from the trust to any beneficiaries. Our record does not indicate whether the trust owns any real property other than the Watauga County land, but if so, under the 2004 Restatement, those real property interests would be distributed to the remainder beneficiaries without a conservation easement, while under the 2005 Amendment the real property may be subject to a conservation easement which would likely affect the use or value of the property. Of course, the interpretation of the conservation easement terms of the 2005 Amendment is not an issue before this Court on this appeal, and this opinion should not be construed as expressing any opinion as to the applicability of the conservation easement provisions to all of the real property owned by the trust. However, the

DUNN v. COOK

[204 N.C. App. 332 (2010)]

language of the trust can be construed as making the conservation easements applicable to all real property in the trust, and for this reason also, the interests of the remainder beneficiaries could be affected by the 2005 Amendment. Rule 19(a) and (b) of the Rules of Civil Procedure provides:

(a) *Necessary joinder*.—Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint

....

(b) *Joinder of parties not united in interest*.—The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

N.C. Gen. Stat. § 1A-1, Rule 19 (2007). This court has noted that

‘A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party.’ *Garrett v. Rose*, 236 N.C. 299, 72 S.E.2d 843 (1952). His interest must be such that no decree can be rendered which will not affect him. *Gaither Corp v. Skinner*, 238 N.C. 254, 77 S.E.2d 659 (1953). ‘The term ‘necessary parties’ embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy. [Citation omitted.] A sound criterion for deciding whether particular persons must be joined in litigation between others appears in this definition: Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined.’ *Assurance Society v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

Wall, 13 N.C. App. at 724, 187 S.E.2d at 457. N.C. Gen. Stat. § 1A-1, Rule 19, did not change the long-standing substantive law regarding joinder of necessary parties which developed prior to adoption of the current Rules of Civil Procedure.

DUNN v. COOK

[204 N.C. App. 332 (2010)]

[Rules 19 and 23²] make no substantive change in the rules relating to joinder of parties as formerly set out in G.S. 1-70 and G.S. 1-73. Both G.S. 1-70 and G.S. 1-73 were repealed by Session Laws 1967, c. 954, s. 4, effective 1 January 1970. ‘The new rules of civil procedure make no change in either the categorizing of parties as necessary, proper and formal, or in the underlying principles upon which the categories have been based.’ 1 McIntosh, N.C. Practice and Procedure 2d, § 585 (Supp. 1970).

Crosrol Carding Developments, Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 451, 183 S.E.2d 834, 837 (1971). When dealing with a trust,

‘[t]he general rule . . . in suits, respecting the trust property, brought either by or against the trustees, the *cestuis que trustent*, or beneficiaries as well as the trustees also, are necessary parties. And when the suit is by or against the *cestuis que trustent*, or beneficiaries, the trustees are also necessary parties; and trustees have the legal interest, and, therefore, they are necessary parties; the *cestuis que trustent*, or beneficiaries, have the equitable and ultimate interest, to be affected by the decree, and, therefore, they are necessary parties,’ citing a wealth of authorities.

First Nat. Bank v. Thomas, 204 N.C. 599, 603, 169 S.E. 189, 191 (1933) (quotation marks omitted).

Because the remainder beneficiaries’ interests will be affected by the adjudication of this action, they are necessary parties. Therefore, we reverse the trial court’s order and remand this case to the Durham County Superior Court for entry of an order for the remainder beneficiaries to be “summoned to appear in the action.” N.C. Gen. Stat. § 1A-1, Rule 19(b). We should not address at this time the arguments of the parties as to the venue of this action, as the remainder beneficiaries may also have interests in regard to venue which are properly addressed after they have been joined in the action. However, we note that

[a]lthough motions for change of venue based on improper venue, pursuant to section 1A-1, Rule 12(b)(3), must be filed prior to or with the answer, motions for change of venue based on the convenience of witnesses, pursuant to section 1-83(2), *must* be filed *after* the answer is filed.

2. N.C. Gen. Stat. § 1A-1, Rule 23 deals with class actions and thus is not applicable here.

ESTATE OF EARLEY v. HAYWOOD CNTY. DEP'T OF SOC. SERVS.

[204 N.C. App. 338 (2010)]

McCullough v. Branch Banking & Trust Co., Inc., 136 N.C. App. 340, 350, 524 S.E.2d 569, 575-76 (2000) (emphasis added and citing *Construction Co. v. McDaniel*, 40 N.C. App. 605, 607, 253 S.E.2d 359, 360 (1979)). For this reason, it is imperative that a party filing a motion for change of venue clearly state the legal basis of the motion and file the motion in a timely manner as appropriate for the type of motion; in ruling on the motion, the trial court should also clearly identify the legal basis for its order allowing or denying a motion for change of venue.

III. Conclusion

For the reasons stated above, we reverse the order of the trial court allowing the change of venue and remand to the Superior Court of Durham County for further proceedings consistent with this opinion.

REVERSE AND REMAND.

Judges STEPHENS and BEASLEY concur.

THE ESTATE OF ADRIANNA LYNN EARLEY, BY AND THROUGH HER ADMINISTRATOR,
JOEY L. EARLEY, PLAINTIFF V. HAYWOOD COUNTY DEPARTMENT OF SOCIAL
SERVICES AND TONY BEAMAN, DIRECTOR, DEFENDANTS

No. COA09-1558

(Filed 1 June 2010)

Immunity—governmental—insurance exclusion

Summary judgment should have been granted for defendant in a wrongful death action against a social services agency and its director where the unambiguous language of the insurance contract states that it provides no coverage as to claims for which the covered person is protected by sovereign immunity.

Appeal by Defendant from order entered 13 August 2009 by Judge Bradley B. Letts in Superior Court, Haywood County. Heard in the Court of Appeals 11 May 2010.

Melrose, Seago & Lay, P.A., by Randal Seago, for plaintiff appellee.

Womble Carlyle Sandridge & Rice, PLLC, by James R. Morgan, Jr., and Christopher J. Geis, for defendant appellant.

ESTATE OF EARLEY v. HAYWOOD CNTY. DEP'T OF SOC. SERVS.

[204 N.C. App. 338 (2010)]

WYNN, Judge.

“Summary judgment is appropriate whenever the movant establishes a complete defense to the [plaintiff’s] claim.”¹ Here, Defendant presented evidence showing that the doctrine of governmental immunity provided a complete defense against Plaintiff’s claim. As such, we reverse the order of the trial court and remand for the entry of summary judgment in Defendant’s favor.

On 4 November 2006, Adrianna Earley died as a result of ingesting prescription pills belonging to her mother, Heather Lacey. On 28 December 2007, Plaintiff, Adrianna’s father and the administrator of her estate, filed suit against Haywood County Department of Social Services (“DSS”) and Tony Beaman in his official capacity² as the director of DSS. Plaintiff alleged that Defendants were liable for the wrongful death of Adrianna because DSS failed to take necessary measures to protect Adrianna from the danger of living with her mother. Plaintiff specifically contended that DSS knew or should have known through prior investigation that Lacey’s misuse of drugs posed a safety risk to Adrianna and that DSS was negligent in failing to remove Adrianna from her mother’s custody.

On 1 February 2008, Defendants filed an answer asserting several affirmative defenses, including the defense of governmental immunity. On 9 April 2009, both Defendants filed a motion for summary judgment asserting, *inter alia*, their entitlement to sovereign and/or governmental immunity. The trial court denied this motion as to Beaman³ on 13 August 2009 and Beaman filed a timely notice of appeal.

Defendant argues on appeal that the trial court erred by denying his motion for summary judgment. Preliminarily, we note that the denial of a motion for summary judgment is an interlocutory order which is not ordinarily appealable. *See Hallman v. Charlotte-*

1. *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 26, 348 S.E.2d 524, 528 (1986) (affirming summary judgment on grounds of governmental immunity).

2. The complaint does not clarify whether Beaman was sued in his official or individual capacity and contains no reference to a suit against Beaman in his individual capacity, so it is presumed that he was sued only in his official capacity. *See Warren v. Guilford County*, 129 N.C. App. 836, 839, 500 S.E.2d 470, 472, *disc. review denied*, 349 N.C. 241, 516 S.E.2d 610 (1998). Furthermore, Plaintiff concedes that Beaman was sued in his official capacity.

3. The trial court initially denied the motion as to DSS without prejudice. However, when DSS filed a renewed motion for summary judgment on 17 August 2009, the trial court granted the motion in an order filed 8 September 2009.

ESTATE OF EARLEY v. HAYWOOD CNTY. DEP'T OF SOC. SERVS.

[204 N.C. App. 338 (2010)]

Mecklenburg Bd. of Educ., 124 N.C. App. 435, 437, 477 S.E.2d 179, 180 (1996). "If, however, 'the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review[,] we may review the appeal under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1).'" *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 50, 542 S.E.2d 227, 230-31, *appeal dismissed and disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001) (quoting *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995)). We have " 'repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review.' " *Hines v. Yates*, 171 N.C. App. 150, 156, 614 S.E.2d 385, 389 (2005) (quoting *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999)). Thus, Defendant's appeal is properly before this court.

On appeal, this Court reviews *de novo* an order denying summary judgment. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). "Summary judgment is appropriate whenever the movant establishes a complete defense to the [plaintiff's] claim." *Overcash*, 83 N.C. App. at 26, 348 S.E.2d at 528 (affirming summary judgment on grounds of governmental immunity).

Defendant argues that the doctrine of governmental immunity establishes a complete defense to Plaintiff's wrongful death claim. "Governmental immunity shields municipalities and the officers or employees thereof sued in their official capacities from suits based on torts committed while performing a governmental function." *Kephart v. Pendergraph*, 131 N.C. App. 559, 563, 507 S.E.2d 915, 918 (1998). This Court has held that when a social service agency is performing investigations into allegations of child abuse, it is performing a governmental function. *Hare v. Butler*, 99 N.C. App. 693, 699, 394 S.E.2d 231, 235, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990); *see also Whitaker v. Clark*, 109 N.C. App. 379, 381, 427 S.E.2d 142, 143, *disc. review denied*, 333 N.C. 795, 431 S.E.2d 31 (1993) ("Services provided by local Departments of Social Services are governmental functions to which governmental immunity applies."). "Thus a county [and its officers] normally would be immune from liability for injuries caused by negligent social services employees working in the course of their duties." *Hare*, 99 N.C. App. at 699, 394 S.E.2d at 235.

However, a county can waive governmental immunity through the purchase of liability insurance or participation in a local government risk pool. N.C. Gen. Stat. § 153A-435(a) (2009). The statute states in part:

ESTATE OF EARLEY v. HAYWOOD CNTY. DEP'T OF SOC. SERVS.

[204 N.C. App. 338 (2010)]

Purchase of insurance pursuant to this subsection waives the county's governmental immunity, *to the extent of insurance coverage*, for any act or omission occurring in the exercise of a governmental function. Participation in a local government risk pool pursuant to Article 23 of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section.

Id. (emphasis added). "Thus, a municipality may waive its governmental immunity for civil liability in tort for negligent or intentional damage by purchasing liability insurance, but only to the extent of the insurance coverage." *Dickens v. Thorne*, 110 N.C. App. 39, 43, 429 S.E.2d 176, 179 (1993) (citation omitted). Because Defendant seeks summary judgment, he must "show that no genuine issue of material fact exists that the policy does not cover [the actions of Defendant] in the instant case." *McCoy v. Coker*, 174 N.C. App. 311, 313-14, 620 S.E.2d 691, 693 (2005) (emphasis omitted).

Defendant attached to the motion for summary judgment the affidavit of David B. Cotton, the County Manager for Haywood County, which states that during the relevant time period the only insurance coverage for Haywood County was provided through the County's participation in the North Carolina Counties Liability and Property Pool Insurance Fund. Attached to the affidavit was a copy of the insurance contract. Plaintiff notes that under the section denoted "Public Officials Liability Coverage" the insurance contract states:

The Pool will pay on behalf of the Covered Person⁴ all sums which the Covered Person shall become legally obligated to pay as money damages for a Wrongful Act⁵ occurring while a Covered Person is acting within the course and scope of his/her duties, during the coverage period shown on the Contract Declarations.

This section of the insurance policy provides coverage for the negligence or breach of duty by a public official acting within the scope of his/her professional duties. When read alone, this general section

4. "Covered Person" is defined in the policy to include "[a] person who is a lawfully elected or appointed official of the [county] while acting under the jurisdiction of the [county] or within the course and scope of his authority or apparent authority, express or implied, but only with respect to his/her liability while acting within the course and scope of his/her authority[.]" The parties agree that Defendant Beaman was a "Covered Person" for purposes of the insurance contract.

5. "Wrongful Act" is defined by the policy as "any . . . act or omission or neglect or breach of duty . . . by a Covered Person while acting within the scope of his/her professional duties or Pool approved activities."

ESTATE OF EARLEY v. HAYWOOD CNTY. DEP'T OF SOC. SERVS.

[204 N.C. App. 338 (2010)]

would allow us to conclude that because Haywood County purchased the coverage, it waived governmental immunity from the instant wrongful death action.

However, the insurance contract further states specifically, in a section denoted "Exclusions," that coverage is not provided for "[a]ny claim, demand, or cause of action against any Covered Person as to which the Covered Person is entitled to sovereign immunity or governmental immunity under North Carolina Law." Additionally, the policy contains a specific provision that sets forth the intentions of the parties not to waive entitlement to sovereign immunity:

The parties to this Contract intend for no coverage to exist under Section V (Public Officials Liability Coverage) as to any claim for which the Covered Person is protected by sovereign immunity and/or governmental immunity under North Carolina law. It is the express intention of the parties to this Contract that none of the coverage set out herein be construed as waiving in any respect the entitlement of the Covered Person to sovereign immunity and/or governmental immunity.

"Our courts have long followed the traditional rules of contract construction when interpreting insurance policies." *Dawes v. Nash Cty.*, 357 N.C. 442, 448, 584 S.E.2d 760, 764, *reh'g denied*, 357 N.C. 511, 587 S.E.2d 417-18 (2003) (citations omitted). "If the language in an exclusionary clause contained in a policy is ambiguous, the clause is 'to be strictly construed in favor of coverage.'" *Daniel v. City of Morganton*, 125 N.C. App. 47, 53, 479 S.E.2d 263, 267 (1997) (quoting *State Auto. Mut. Ins. Co. v. Hoyle*, 106 N.C. App. 199, 201-02, 415 S.E.2d 764, 765, *disc. rev. denied*, 331 N.C. 557, 417 S.E.2d 803 (1992)). However, " '[i]f the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.' " *Dawes*, 357 N.C. at 449, 584 S.E.2d at 764 (quoting *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978)).

In the instant case, the unambiguous language of the insurance contract states that it provides "no coverage . . . as to any claim for which the Covered Person is protected by sovereign immunity and/or governmental immunity under North Carolina law." "A county is immune from liability for injuries caused by negligent social services employees working in the course of their duties absent a waiver of

ESTATE OF EARLEY v. HAYWOOD CNTY. DEP'T OF SOC. SERVS.

[204 N.C. App. 338 (2010)]

that immunity.” *Patrick v. Wake Cty. Dep’t of Human Servs.*, 188 N.C. App. 592, 597, 655 S.E.2d 920, 924 (2008) (citation omitted). As such, the insurance policy excludes coverage for claims such as that asserted by Plaintiff. Accordingly, Defendant did not waive governmental immunity from Plaintiff’s claim through the purchase of the insurance policy.

Nonetheless, Plaintiff urges us to interpret Defendant’s insurance contract as not waiving governmental immunity so as not to contradict the “the policy of our Courts.” However, this Court previously construed similar insurance contract provisions as not establishing a waiver of governmental immunity. For example, in *Patrick*, this Court considered the following provision in an insurance contract:

This policy is not intended by the insured to waive its governmental immunity as allowed by North Carolina General Statutes Sec. 153A-435. Accordingly, subject to this policy and the Limits of Liability shown on the Declarations, this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defenses [sic] is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable.

Id. at 596, 655 S.E.2d at 923 (emphasis omitted). The Court determined that defendants, whose alleged negligence was at issue, had not waived sovereign immunity through the purchase of this policy and affirmed the trial court’s grant of summary judgment, stating that the defense of sovereign immunity barred plaintiff’s claims. *Id.* at 597, 655 S.E.2d at 924.

We acknowledge the arguably circular nature of the logic employed in *Patrick*. The facts are that the legislature explicitly provided that governmental immunity is waived to the extent of insurance coverage, but the subject insurance contract eliminates any potential waiver by excluding from coverage claims that would be barred by sovereign immunity. Thus, the logic in *Patrick* boils down to: Defendant retains immunity because the policy doesn’t cover his actions and the policy doesn’t cover his actions because he explicitly retains immunity. Nonetheless in this case, as in *Patrick*, where the language of both the applicable statute and the exclusion clause in the insurance contract are clear, we must decline Plaintiff’s invitation to implement “policy” in this matter. Any such policy implementation is best left to the wisdom of our legislature.

SCHWARZ PROPERTIES, LLC v. TOWN OF FRANKLINVILLE

[204 N.C. App. 344 (2010)]

In sum, despite Plaintiff's argument to the contrary, because governmental immunity provided Defendant with a complete defense to Plaintiff's claims, his motion for summary judgment should have been granted. Accordingly, we reverse and remand for the entry of summary judgment in Defendant's favor.

Reversed and Remanded.

Judges CALABRIA and STEELMAN concur.

SCHWARZ PROPERTIES, LLC, PLAINTIFF v. TOWN OF FRANKLINVILLE, DEFENDANT

No. COA09-1446

(Filed 1 June 2010)

1. Injunctions— dissolution of temporary restraining order—recovering costs of defense as damages

The trial court did not err in a declaratory judgment action seeking to void various zoning ordinances by awarding costs of defense to defendant upon dismissal of a temporary restraining order (TRO) obtained without malice or want of probable cause. There are no cases holding that damages under N.C.G.S. § 1A-1, Rule 65(e) cannot include the costs of defending against a TRO.

2. Statutes of Limitation and Repose— zoning ordinance or amendment—two months

The trial court did not err in a declaratory judgment action seeking to void various zoning ordinances by applying a two-month statute of limitations. N.C.G.S. § 160A-364.1 provides that a cause of action as to the validity of a zoning ordinance or amendment must be brought within two months of its adoption, and plaintiff's complaint was filed more than a year after the statute of limitations had run.

3. Immunity— sovereign immunity—failure to allege waiver—dismissal of claim

The trial court did not err in a declaratory judgment action seeking to void various zoning ordinances by dismissing under N.C.G.S. § 1A-1 Rule 12(b)(6) plaintiff's claim requiring sewer line

SCHWARZ PROPERTIES, LLC v. TOWN OF FRANKLINVILLE

[204 N.C. App. 344 (2010)]

capping and claim for garbage removal services based on failure to allege a waiver of sovereign immunity. Plaintiff failed to argue an abuse of discretion by the trial court and thus failed to meet his burden on appeal.

Appeal by plaintiff from orders entered 24 July and 28 July 2009 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 15 April 2010.

Benjamin Spence Albright for plaintiff-appellant.

Little & Little, P.L.L.C., by Cathryn M. Little, for defendant-appellee.

BRYANT, Judge.

On 13 April 2009, plaintiff Schwarz Properties, LLC, sought a declaration that various zoning ordinances enacted by defendant Town of Franklinville were void, damages to recover expenditures and for loss of income, and a temporary restraining order (“TRO”). On 28 April 2009, the trial court issued a TRO enjoining defendant from rejecting applications to place mobile homes on properties on the basis of the contested ordinances. In May 2009, defendant filed motions to dismiss under Rules 12(b)(1) and 12(b)(6), to dissolve the TRO under Rule 65(b), and for damages upon dissolution under Rule 65(e). Defendant also filed a supplement to these motions, seeking damages for the costs incurred in defending plaintiff’s action in the amount of its liability insurance deductible. On 27 May 2009, following a hearing, the trial court dissolved the TRO, denied plaintiff’s request for a preliminary injunction, allowed defendant to revoke two permits issued during the time when the TRO was in effect, and deferred defendant’s motion on damages. On 10 June 2009, defendant moved for Rule 11 sanctions. Following another hearing, on 24 July 2009, the trial court entered an order dismissing all of plaintiff’s claims under Rule 12(b)(6) and reserving the remaining issues. On 28 July 2009, the trial court entered an order finding defendant had failed to pursue Rule 11 sanctions and plaintiff had sought the TRO without malice. However, the trial court awarded damages to defendant in the amount of \$2500, its liability insurance deductible. Plaintiff appeals. As discussed below, we affirm.

Facts

Plaintiff rents mobile homes and mobile home spaces on a 138 acre parcel of land located within defendant’s boundaries. At the

SCHWARZ PROPERTIES, LLC v. TOWN OF FRANKLINVILLE

[204 N.C. App. 344 (2010)]

heart of this case are a series of ordinances enacted by defendant: an 8 January 2008 ordinance which prohibits issuance of permits to install mobile homes that are more than ten years old; a 10 February 2009 ordinance requiring property owners to extend and cap sewer lines upon removal of a structure from municipal sewer connections; and a 9 December 2009 ordinance requiring property owners to pay for replacement of municipally-provided trash carts and cans which are lost, stolen or damaged. Plaintiff asserted these ordinances were void for various reasons, including being unconstitutional, arbitrary and capricious, and in excess of defendant's legislatively-granted authority.

Plaintiff makes three arguments in its brief to this Court: the trial court erred in (I) awarding costs of defense in a civil action upon dismissal of a TRO which was not obtained with malice or want of probable cause; (II) applying a two-month statute of limitations to an *ultra vires* zoning ordinance; and (III) dismissing plaintiff's claims under Rule 12(b)(6). We affirm.

I

[1] Plaintiff first argues the trial court erred in awarding costs of defense in a civil action upon dismissal of a TRO which was not obtained with malice or want of probable cause. We disagree.

Rule of Civil Procedure 65 provides:

(e) Damages on dissolution.—An order or judgment dissolving an injunction or restraining order may include an award of damages against the party procuring the injunction and the sureties on his undertaking without a showing of malice or want of probable cause in procuring the injunction. The damages may be determined by the judge, or he may direct that they be determined by a referee or jury.

N.C. Gen. Stat. § 1A-1, Rule 65 (2009). Our Supreme Court has emphasized the options available upon dissolution of a TRO which has been improvidently granted:

the remedies available to the party who has been wrongfully restrained are as follows: (1) He may recover damages from the party who procured the restraining order and the sureties on his injunction bond without proof of malice or want of probable cause. In this connection, see G.S. 1A-1, Rule 65(e). (2) He may

SCHWARZ PROPERTIES, LLC v. TOWN OF FRANKLINVILLE

[204 N.C. App. 344 (2010)]

institute an action for malicious prosecution against the party who procured the restraining order and recover damages without regard to the limit of the bond upon establishing the elements necessary to constitute an action for malicious prosecution.

Int'l Bhd. of Elec. Workers Local 755 v. Country Club E., Inc., 283 N.C. 1, 9, 194 S.E.2d 848, 853 (1973). Plaintiff asserts that the damages contemplated in Rule 65(e) are special damages “beyond those normally incident to a civil proceeding” and, thus, do not include legal costs. He cites *Int'l Bhd. of Elec. Workers Local 755* for the proposition that “[b]efore any cause of action will exist in connection with malicious, unjustified civil proceedings, they must have resulted in *special damages* beyond those normally incident to a civil proceeding.” *Id.* at 10, 194 S.E.2d at 853-54 (emphasis in original) (citation and quotation marks omitted). However, this language plainly deals with damages awarded in malicious prosecution actions and is therefore inapposite here, where the damages were awarded under Rule 65(e) “without a showing of malice or want of probable cause in procuring the injunction.” Plaintiff cites no case, and we have found none, where our State’s courts have held that damages under Rule 65(e) cannot include the costs of defending against a TRO. This argument is overruled.

II

[2] Plaintiff next argues the trial court erred in applying a two-month statute of limitations to an *ultra vires* zoning ordinance. We disagree.

“Zoning claims raise important public policy considerations. There is a strong need for finality with respect to zoning matters so that landowners may use their property without fear of a challenge years after zoning has apparently been determined.” *Pinehurst Area Realty, Inc. v. Village of Pinehurst*, 100 N.C. App. 77, 80-81, 394 S.E.2d 251, 253 (1990), *review denied and appeal dismissed*, 328 N.C. 92, 402 S.E.2d 417, *cert. denied*, 501 U.S. 1251, 115 L. Ed. 2d 1055 (1991). For this reason, a cause of action as to the validity of a zoning ordinance or amendment must be brought within two months of its adoption. N.C. Gen. Stat. § 160A-364.1 (2009) (applicable to cities and towns)¹; *see also* N.C. Gen. Stat. § 153A-348 (2009) (applicable to

1. “A cause of action as to the validity of any zoning ordinance, or amendment thereto, adopted under this Article or other applicable law shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought within two months as provided in G.S. 1-54.1.” N.C.G.S. § 160A-364.1.

SCHWARZ PROPERTIES, LLC v. TOWN OF FRANKLINVILLE

[204 N.C. App. 344 (2010)]

counties)². “[O]ur courts have strictly applied Statutes of Limitation in zoning cases.” *Potter v. City of Hamlet*, 141 N.C. App. 714, 719, 541 S.E.2d 233, 236 (applying statute of limitations where a municipality failed to timely record a map or written description of an extraterritorial jurisdiction with the register of deeds), *cert. denied*, 353 N.C. 379, 547 S.E.2d 814 (2001); *see also Thompson v. Town of Warsaw*, 120 N.C. App. 471, 473, 462 S.E.2d 691, 692 (1995) (“even where an amendment is adopted inconsistent with the notice requirements of Chapter 160A, an action which attacks the validity of the amendment commenced [outside the statute of limitations] is barred”); *Pinehurst Area Realty, Inc.*, 100 N.C. App. at 81, 394 S.E.2d at 253-54 (applying statute of limitations to challenges based on alleged state and federal constitutional violations). Further, this Court has applied the statute of limitations to a challenge to a mobile home zoning ordinance as *ultra vires*, similar to that at issue here. *White v. Union County*, 93 N.C. App. 148, 152, 377 S.E.2d 93, 95 (1989). In *White*, this Court held that “plaintiffs have stated a direct attack on the ordinance *so long as they can show that the attack is timely* under N.C.G.S. § 153A-348 [the statute stating the statute of limitations applicable to county zoning ordinances and amendments].” *Id.* (emphasis added). The Court went on to note:

For purposes of N.C.G.S. § 153A-348, the timing of plaintiff’s complaint should be considered as it would have been on 4 January 1988, the date it was originally brought in superior court. Though not fatal to this appeal, plaintiffs neglected to state the date of adoption of the ordinance and include a copy of the ordinance in the record. Such proof will be necessary on remand.

Id. Plaintiff characterizes this language as *dicta*, but we read it as integral to the disposition of *White* and therefore controlling on the same issue here. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”).

In the instant case, plaintiff’s complaint alleges the ordinance was enacted 8 January 2008. Pursuant to N.C.G.S. § 160A-364.1, the statute of limitations barred challenges to the ordinance as of 8

2. “A cause of action as to the validity of any zoning ordinance, or amendment thereto, adopted under this Part or other applicable law shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought within two months as provided in G.S. 1-54.1.” N.C.G.S. § 153A-348.

SCHWARZ PROPERTIES, LLC v. TOWN OF FRANKLINVILLE

[204 N.C. App. 344 (2010)]

March 2008. Plaintiff's complaint was not filed until 13 April 2009, more than a year after the statute of limitations had run. The trial court correctly dismissed plaintiff's challenge to the ordinance as time-barred and plaintiff's argument on this point is overruled.

III

[3] Plaintiff also argues the trial court erred in dismissing plaintiff's second and fourth claims under Rule 12(b)(6) for failing to allege a waiver of sovereign immunity. We disagree.

The trial court's 24 July 2009 order dismissed plaintiff's (1) second cause of action (for damages related to defendant's ordinance requiring sewer line capping) and fourth cause of action (for damages caused by failure to provide garbage removal services) for a failure to allege a waiver of sovereign immunity, citing *Reid v. Town of Madison*, 137 N.C. App. 168, 170, 527 S.E.2d 87, 89 (2000). In *Reid*, this Court held that

[u]nder the doctrine of governmental immunity, a municipality is immune from suit for torts committed by officers or employees while performing a governmental function. We note that garbage collection is a governmental function. However, a city can waive its immunity by purchasing liability insurance. The city waives immunity only to the extent the insurance contract indemnifies it from liability for the alleged acts. If a plaintiff does not allege a waiver of immunity by the purchase of insurance, the plaintiff has failed to state a claim against the governmental unit.

Id. (citations omitted). Further, a town's passage of an ordinance requiring connection to a sewer system is a governmental function and, in such cases, "the Town is immune from tort liability." *Blevins v. Denny*, 114 N.C. App. 766, 770, 443 S.E.2d 354, 356 (1994). Because plaintiff failed to allege a waiver of sovereign immunity, the trial court properly dismissed its second and fourth claims.

Plaintiff counters that these claims were not made in tort, but were rather for declaratory judgment (cause of action 2) and under theories of quantum meruit and unjust enrichment (cause of action 4). The second cause of action does include a request for a declaration that the ordinance requiring capping of sewer lines was void. However, "section 1-257 of the [North Carolina Uniform Declaratory Judgment Act] explicitly gives courts discretion to decline requests for declaratory relief." *Augur v. Augur*, 356 N.C. 582, 586, 573 S.E.2d 125, 129 (2002) (citing N.C. Gen. Stat. §§ 1-253 through 1-255).

STATE v. BIVENS

[204 N.C. App. 350 (2010)]

Because North Carolina trial courts are expressly accorded discretion under the very statute creating the declaratory judgment remedy, N.C.G.S. § 1-257, and because trial courts are best positioned to assess the facts bearing on the usefulness of declaratory relief in a particular case, the trial court's decision to decline a party's request for declaratory relief is reviewed under the abuse of discretion standard.

Id. at 587, 573 S.E.2d at 129-30 (citations omitted). Plaintiff does not argue an abuse of discretion by the trial court in this matter and thus fails to meet his burden on appeal.

As to plaintiff's unjust enrichment claim in cause of action 4, as the trial court noted in its order, despite the language used in the complaint, plaintiff was essentially seeking damages for defendant's breach of its duty to collect garbage, a governmental function. This was also the circumstance in *Blevins*, where the plaintiffs sought damages on the theory of unjust enrichment after a town enacted "an ordinance requiring every person owning improved property within the corporate limits to connect to the Town's water and sewer system." 114 N.C. App. at 768, 443 S.E.2d at 355. In that case, we reversed and remanded for judgment to be entered in favor of the defendant Town based on governmental immunity. *Id.* at 771, 443 S.E.2d at 356. Plaintiff's similar arguments here are without merit.

Affirmed.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA v. TIMOTHY RAYNARD BIVENS, DEFENDANT

No. COA09-483

(Filed 1 June 2010)

1. Jury— instructions—no error

The trial court did not err by failing to give the jury instruction requested by defendant on the full definition of a counterfeit controlled substance set forth in N.C.G.S. § 90-87 because defendant failed to submit his request for the special instruction in writing. Moreover, the jury instruction given by the trial court

STATE v. BIVENS

[204 N.C. App. 350 (2010)]

was adequate for a jury to determine whether the substance at issue was intentionally misrepresented.

2. Drugs— possession of counterfeit controlled substance— sufficient evidence

The trial court did not err in denying defendant's motion to dismiss the charge of possession, sale, and delivery of a counterfeit controlled substance because there was sufficient evidence of each element of the offense, including that defendant represented that the substance at issue was a controlled substance.

Appeal by defendant from judgment entered 25 September 2008 by Judge Calvin E. Murphy in Stanly County Superior Court. Heard in the Court of Appeals 16 November 2009.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Michael E. Casterline for defendant.

ELMORE, Judge.

On 18 July 2006, law enforcement officials from several jurisdictions in and around Stanly County met at a staging area in Oakboro to conduct an undercover drug interdiction campaign. Under a mutual assistance agreement between law enforcement departments, officers from outside Stanly County's jurisdiction were assigned to go to specific locations and attempt to buy illegal drugs from suspected street-level dealers. Equipped with an undercover car containing two hidden video cameras and street clothes, Detective Marnee Moberg and Officer Jarrod Hodge went to their designated location to attempt to buy illegal drugs.

Once at their designated location on Hamilton Street, Detective Moberg and Officer Hodge were waved over by Timothy R. Bivens (defendant). Approaching the driver's side window, defendant asked Detective Moberg what she was looking for, to which she replied: "looking for a 20." Based on her training and experience, Detective Moberg understood that to mean twenty dollars' worth of crack cocaine. Defendant instructed the detective to pull off the road, while he walked to a dark SUV nearby. Defendant returned with a small plastic baggie containing a white rock-like substance that both officers believed to be crack cocaine, and Detective Moberg handed defendant a twenty dollar bill.

STATE v. BIVENS

[204 N.C. App. 350 (2010)]

After the transaction, the officers returned to the staging area where many other officers, including Stanly County Sheriff's Office Detective Speights, joined them in viewing the videotapes of the encounter. Detective Speights took the baggie containing the crack-like substance from the transaction, later identified as calcium carbonate, and helped to identify defendant. A warrant for defendant's arrest was issued 31 July 2006, but was not enforced until February 2007 in order to protect the identities of the officers involved in the undercover operation.

On 25 September 2008, defendant was convicted by jury of (1) one count of possession with intent to sell or deliver a counterfeit controlled substance, (2) one count of sale of a counterfeit controlled substance, and (3) one count of delivery of a counterfeit controlled substance. After the jury returned its verdict of guilty on the above counts, defendant admitted habitual felon status. He was sentenced to an active term of 80 to 105 months' imprisonment. Defendant now appeals.

I. Jury Instruction

[1] Defendant first argues that the trial court committed reversible error in failing to give the jury instruction requested by defendant, even though that instruction was supported by law. Defendant specifically argues that the trial court should have instructed the jury "with the full definition of [a] counterfeit controlled substance set forth in N.C.G.S. § 90-87[.]" and that failing to do so did not allow the jury to accurately decide whether defendant made a representation that the substance was a controlled substance. This argument fails.

As our Supreme Court has stated, "the trial court is not required to give the exact instructions requested by a defendant. Instead, requested instructions need only be given in substance if correct in law and supported by the evidence." *State v. Morgan*, 359 N.C. 131, 169, 604 S.E.2d 886, 909 (2004) (citations omitted). Further, as this Court has held, we "review[] jury instructions contextually and in [their] entirety. The charge will be held to be sufficient if it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed." *State v. Blizzard*, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (quotations and citation omitted). Additionally, our Supreme Court has held that "a trial court's ruling denying requested instructions is not error where the defendant fails to submit his request for instructions in writing." *State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997).

STATE v. BIVENS

[204 N.C. App. 350 (2010)]

Accordingly, the law supports our immediately overruling defendant's first argument because defendant failed to submit his special jury instruction in writing. Even had the special instruction been properly submitted in writing, however, the trial court did not err in failing to submit it to the jury. The jury instruction given by the trial court regarding the charge of possessing a counterfeit controlled substance, with intent to sell or deliver it, reads in relevant part:

For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:

First, that the defendant knowingly possessed a counterfeit controlled substance. A counterfeit controlled substance means any substance which is by any means intentionally represented as a controlled substance when it is not. It is evidence that the counterfeit substance has been intentionally misrepresented as a controlled substance if the following factors are established: (1) the substance was packaged or delivered in a manner normally used for the illegal delivery of controlled substances; (2) money has been exchanged or requested for the substance, and (3) the physical appearance of the substance is substantially identical to crack cocaine.

A person possesses a counterfeit controlled substance when he is aware of its presence and has either by himself or together with others both the power and intent to control the disposition or use of that substance.

And Second, that the defendant intended to sell or deliver the counterfeit controlled substance. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You may arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

The substantially similar jury instruction that defendant orally requested was taken directly from N.C. Gen. Stat. § 90-87(6), and defines "counterfeit controlled substance" as:

b. Any substance which is by any means intentionally represented as a controlled substance. It is evidence that the substance has been intentionally misrepresented as a controlled substance if the following factors are established:

STATE v. BIVENS

[204 N.C. App. 350 (2010)]

1. The substance was packaged or delivered in a manner normally used for the illegal delivery of controlled substances.
2. Money or other valuable property has been exchanged or requested for the substance, and the amount of that consideration was substantially in excess of the reasonable value of the substance.
3. The physical appearance of the tablets, capsules or other finished product containing the substance is substantially identical to a specified controlled substance.

N.C. Gen. Stat. § 90-87(6) (2009).

Defendant contends that omission of “and the amount of that consideration was substantially in excess of the reasonable value of the substance” from the given jury instruction misled the jury and prevented the jury from realizing the State’s failure to offer evidence of the value of the substance in the bag, calcium carbonate. Defendant asserts that, given this added information the jury, could conclude that the State failed to prove every factor to establish intentional misrepresentation of a controlled substance and did not meet their burden.

Defendant misconstrues the statute. Defendant concludes that, for a controlled substance to be considered intentionally misrepresented, all three factors listed in the statute must be met. However, the statute clearly states that “[i]t is *evidence* that the substance has been intentionally misrepresented as a controlled substance if the following factors are established[,]” not that those factors are required to find that a controlled substance has been intentionally misrepresented. N.C. Gen. Stat. § 90-87(6)b (2009) (emphasis added).

The jury found that there was adequate evidence that defendant intentionally misrepresented the substance. The white rock-like substance defendant possessed was packaged in a zip-lock baggie and was delivered in the manner normally used for the delivery of controlled substances. Money was exchanged between defendant and Detective Moberg for the substance. The substance defendant possessed and then sold to Detective Moberg substantially resembled crack cocaine.

Viewing the jury instruction given by the trial court contextually and in its entirety, the law and case were sufficiently presented to jury in a clear and accurate manner, and as such the trial court’s instruction was adequate for a jury to determine whether the substance was

STATE v. BIVENS

[204 N.C. App. 350 (2010)]

intentionally misrepresented. Regardless, however, because defendant did not submit the instruction in writing, this assignment of error is overruled.

II. Motion to Dismiss

[2] Defendant next argues that there is insufficient evidence to support defendant's convictions for possession, sale and delivery of a counterfeit controlled substance because there is no evidence that defendant represented that the substance was a controlled substance. Defendant argues that, since there is no evidence that he represented the substance as a controlled substance, the trial court erred in denying his motions to dismiss. We disagree.

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is evidence that a reasonable mind might find adequate to support a conclusion." *State v. Hargrave*, — N.C. App. —, —, 680 S.E.2d 254, 261 (2009) (citation omitted). "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom" *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. "[C]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve[.]" *State v. Prush*, 185 N.C. App. 472, 478, 648 S.E.2d 556, 560 (2007).

Defendant's convictions resulted from a violation of N.C. Gen. Stat. § 90-95(a)(2), which states that it is unlawful to "create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance." To obtain a conviction under this statute, "the State must prove (1) that defendant possessed a counterfeit controlled substance, and (2) that defendant intended to sell or deliver the counterfeit controlled substance." *State v. Williams*, 164 N.C. App. 638, 644, 596 S.E.2d 313, 317 (2004) (quotations and citation omitted). N.C. Gen. Stat. § 90-87(6)b defines a counterfeit controlled substance as "[a]ny substance which is by any means intentionally represented as a controlled substance." N.C. Gen. Stat. § 90-87(6)b (2009).

As discussed in section I *supra*, sufficient evidence was presented to the jury that defendant possessed the counterfeit controlled

STATE v. BIVENS

[204 N.C. App. 350 (2010)]

substance and that he intended to sell or deliver it to Detective Moberg. The evidence presented at trial showed that defendant approached a vehicle, asked its occupants what they were looking for, departed to fill their request for “a twenty,” and handed the occupants a little baggie containing a white rock-like substance. Looking at this evidence in the light most favorable to the State, we are hard pressed to hold that a reasonable mind could deduce from these facts that defendant intended to peddle calcium carbonate and did not represent the substance as an illicit drug.

Defendant next asserts that there is no evidence that he knew the substance sold was counterfeit. Specifically, defendant argues that he was an “unwitting middleman” and that it just as likely that he himself believed he was selling Detective Moberg crack cocaine. In so arguing, defendant improperly attempts to insert a knowledge requirement into the relevant statutes.

Nowhere in N.C. Gen. Stat. § 90-95(a)(2) does the crime require that defendant have knowingly misrepresented a counterfeit controlled substance as an actual controlled substance; it requires merely that he “create, sell or deliver, or possess with intent to sell or deliver,” the substance. N.C. Gen. Stat. § 90-95(a)(2) (2009). N.C. Gen. Stat. § 90-87(6), which defines the term counterfeit controlled substance, requires only that the substance be “intentionally represented as a controlled substance[,]” not that a defendant have specific knowledge that the substance is counterfeit. N.C. Gen. Stat. § 90-87(6)b (2009). As such, this argument is overruled.

III. Habitual Felon Status

Finally, defendant argues that his sentence as a habitual felon should be set aside because the trial court erred in convicting him. Since we have found no error in the underlying convictions, this argument is without merit.

Accordingly, we hold that defendant received a trial free from error.

No error.

Chief Judge MARTIN and Judge GEER concur.

STATE v. BRUNSON

[204 N.C. App. 357 (2010)]

STATE OF NORTH CAROLINA v. LARRY DARNELL BRUNSON, DEFENDANT

No. COA09-976

(Filed 1 June 2010)

Evidence— lay opinion—hydrocodone—visual identification—chemical analysis required

The trial court committed plain error in a drug case by admitting an SBI drug chemist's opinion testimony based on visual identification, without any actual chemical analysis, that the 40 pills found in defendant's possession were 38.2 grams of hydrocodone. The testimony, although supported by experience and education, was tantamount to baseless speculation and equivalent to testimony of a layperson.

Judge BRYANT concurring in separate opinion.

Appeal by defendant from judgment entered 25 March 2009 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 13 January 2010.

Attorney General Roy Cooper, by Assistant Attorney General Stanley G. Abrams, for the State.

William D. Spence for defendant.

ELMORE, Judge.

Larry Darnell Brunson (defendant) appeals his convictions for hydrocodone possession and transportation and for improper passing. For the reasons stated herein, we reverse the trial court's judgment and remand for a new trial.

On 16 January 2008, at about 4:29 p.m., Wilmington Police Officer Peter Oehl saw defendant on Dawson Street at an intersection on 8th Street in Wilmington. Officer Oehl observed defendant's vehicle improperly pass a stopped vehicle and almost hit his unmarked police car as he entered the intersection. Officer Oehl pulled defendant over and observed that defendant seemed nervous. Defendant told the officer that he had a problem with his brakes. Officer Oehl believed that defendant might be engaged in some other "type of suspicious activity" and asked defendant to step out of the car as other officers arrived on scene.

When outside of his vehicle, defendant reached into his right side jacket pocket. Officer Oehl cautioned defendant not to put his hand

STATE v. BRUNSON

[204 N.C. App. 357 (2010)]

into his pocket while the officer was talking to him. The officer then asked if he could search defendant and defendant's vehicle. Defendant consented to a search of the vehicle but not to a search of his person. Officer Oehl told defendant that that was fine, but that he was going to pat him down. Officer Oehl began a patdown and defendant went for his right side pocket again. The other officers at the scene grabbed defendant's arm and "went into his pocket to see why he kept trying to reach in there." The officers pulled three items from the right pocket: a cell phone, a cell phone charger, and "a pill bottle, brown in color, that had no label on it, with what appeared to be some type of white pills." The officers opened the pill bottle and saw that there were forty white pills that had "M360" stamped on them inside the bottle. Subsequently, Officer Oehl called the New Hanover Hospital Pharmacy and was told that pills with those characteristics were hydrocodone, an opium derivative. Officer Oehl charged defendant with trafficking in opiates by possession and by transportation as well as for improper passing.

At trial, the State had an SBI drug chemist, Brittany Dewell, testify about her analysis of the pills. Ms. Dewell testified that she weighed the forty pills and identified the markings on them, but performed no chemical analysis on the pills. Ms. Dewell used a Micromedex database of pharmaceutical preparations to identify the pills according to their markings, color, and shape. Ms. Dewell testified that she had weighed and compared the pills with the database, and that the forty pills constituted 38.2 grams of a pharmaceutical preparation known as hydrocodone, an opium derivative, which is a Schedule III substance.

Defendant offered no evidence at trial. The jury returned verdicts of guilty against defendant for trafficking in hydrocodone by possession of more than twenty-eight grams of hydrocodone, trafficking in hydrocodone by transportation of more than twenty-eight grams of hydrocodone, and improper passing. Judge Hockenbury consolidated the charges and sentenced defendant to an active term of 225 months minimum and 279 months maximum in the custody of the North Carolina Department of Corrections. Defendant now appeals.

Defendant argues numerous assignments of error, but we remand solely on the basis of assignment of error 11:

11. The trial court erred and committed plain error in allowing the State's expert chemist, Ms. Dewell[,] to give her opinion that the 40 pills were 38.2 grams of a pharmaceutical preparation con-

STATE v. BRUNSON

[204 N.C. App. 357 (2010)]

taining dihydrocoheinone which is another chemical name for hydroco[]done, a Schedule III substance and an opiate derivative, for the reason that Ms. Dewell failed to perform sufficient analysis and testing of any of the pills to support her opinion. Identification of suspected controlled substances by visual inspection alone is insufficient.

We agree. Since we find sufficient grounds to vacate the trial court's holding and remand for a new trial for defendant on this basis, we only address the arguments surrounding that issue.

Since defendant at trial made no objections to Ms. Dewell's testimony, we review for plain error. N.C.R. App. P. 10(a)(4) (2010). Our Supreme Court has held that "[a] reversal for plain error is only appropriate in the most exceptional cases." *State v. Duke*, 360 N.C. 110, 138, 623 S.E.2d 11, 30 (2005). This Court has held that the plain error rule:

is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 672 F.2d 995, 1002 (4th Cir. 1982)) (footnotes omitted).

With great caution, as prescribed by the plain error rule, we find that admittance of Ms. Dewell's opinion testimony, without any actual chemical analysis, amounted to defendant's not receiving a fair trial.

North Carolina Rule of Evidence 702(a) provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2009). This expert assistance to the jury

STATE v. BRUNSON

[204 N.C. App. 357 (2010)]

cannot be baseless speculation under the confines of Rule 702. *Cherry v. Harrell*, 84 N.C. App. 598, 605, 353 S.E.2d 433, 438 (1987). In conjunction with this rule, our Supreme Court has devised a three-step analysis for evaluating the admissibility of expert testimony that has been accepted by this Court: “(1) Is the expert’s proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert’s testimony relevant?” *State v. Ward*, — N.C. App. —, —, 681 S.E.2d 354, 368 (2009) (quotations and citations omitted).

Ms. Dewell, as an expert chemist, satisfied the requirements of Rule 702 to testify to the chemical composition of chemically analyzed drugs. However, without performing any chemical analysis on the pills, her testimony, although supported by experience and education, was tantamount to baseless speculation and equivalent to testimony of a layperson. Ms. Dewell’s proffered method of proof, visual inspection, was not sufficiently reliable as a basis for expert testimony. Our Supreme Court in *State v. Llamas-Hernandez* held that visual identification of a suspected controlled substance by a layperson was impermissible and identification testimony should rest on chemical analysis. *State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009) (reversing for reasons asserted in the dissenting opinion of the appellate court, 189 N.C. App. 640, 654, 659 S.E.2d 79, 88 (2008)). In *Llamas-Hernandez*, the visual identification by two police officers of a substance as cocaine based on its appearance was held to be lacking sufficient reliability. *Id.*

Pursuant to that ruling, this Court in *State v. Ward* held that “controlled substances defined in terms of their chemical composition can only be identified through the use of a chemical analysis rather than through the use of lay testimony based on visual inspection.” *State v. Ward*, — N.C. App. —, —, 681 S.E.2d 354, 371 (2009). Although an expert may have an extensive background in the field of drug analysis, visual analysis by that expert lacks sufficient indices of reliability to support admission of testimony regarding a substance’s identification. *Id.* at —, 681 S.E.2d at 372. In *Ward*, as here, the trial court allowed testimony by the State’s expert that relied upon visual identification and Micromedics Literature to determine that the tablets in question were a controlled substance. *Id.*

Ms. Dewell relied upon visual identification and the use of a Micromedics database of pharmaceutical preparations to determine that the pills found on defendant were an opium derivative,

STATE v. BRUNSON

[204 N.C. App. 357 (2010)]

hydrocodone. Hydrocodone, as an opium derivative, is a controlled substance that our General Assembly has defined in terms of its chemical composition. N.C. Gen. Stat. § 90-91(d) (2009). Ms. Dewell's visual identification lacked sufficient indices of reliability to determine the actual substance of the pills. Pursuant to this Court's holding in *Ward*, we hold that Ms. Dewell's testimony was not a valid identification because no chemical analysis was performed. There is a significant probability that, had the lower court properly excluded Ms. Dewell's testimony, the jury would have found defendant not guilty. Accordingly, we find the trial court committed plain error in allowing the opinion testimony of State expert Brittany Dewell, and we vacate and remand for a new trial for defendant.

New trial.

Judge STROUD concurs.

Judge BRYANT concurs by separate opinion.

BRYANT, Judge, concurring in the result.

Because *In re Civil Penalty* requires the result reached in the majority opinion, I concur in the result. 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). However, I write separately to express my concern that requiring chemical analyses of substances which are readily identifiable by visual inspection goes beyond what our General Statutes require.

The majority opinion relies on language from *State v. Ward* that "controlled substances defined in terms of their chemical composition can only be identified through the use of a chemical analysis rather than through the use of lay testimony based on visual inspection." — N.C. App. —, —, 681 S.E.2d 354, 371, *disc. review granted*, 363 N.C. 662, 686 S.E.2d 153 (2009). Our decision in *Ward* was characterized as an extension of the "logic utilized by Judge Steelman in dissent with the subsequent approval of the Supreme Court" in *State v. Llamas-Hernandez*, 189 N.C. App. 640, 659 S.E.2d 79 (2008), *rev'd*, 363 N.C. 8, 673 S.E.2d 658 (2009). *Id.* However, I believe *Ward* actually went beyond the result suggested by Judge Steelman's dissent in that case. *Llamas-Hernandez* concerned visual identification of a non-descript white powder as cocaine. 189 N.C.

STATE v. CROWELL

[204 N.C. App. 362 (2010)]

App. at 646, 659 S.E.2d at 83. Judge Steelman's dissent specifically distinguished visual identification of such common, non-descript substances from more distinctive controlled substances, noting: "Crack cocaine has a distinctive color, texture, and appearance. While it might be permissible, based upon these characteristics, for an officer to render a lay opinion as to crack cocaine, it cannot be permissible to render such an opinion as to a non-descript white powder." *Id.* at 654, 659 S.E.2d at 87 (distinguishing *State v. Freeman*, 185 N.C. App. 408, 648 S.E.2d 876 (2007)). Despite this distinction in *Llamas-Hernandez*, in *Ward*, as in the instant case, we found error where the trial court allowed testimony from an expert chemist that pharmaceutical pills stamped with identifying markings were controlled substances. *Ward*, — N.C. App. at —, 681 S.E.2d at 371-73. Thus, I believe *Ward* extended beyond the logic of the dissent in *Llamas-Hernandez*. In this light, I note that the North Carolina Supreme Court granted discretionary review in *Ward*, and, therefore, we may have additional guidance on this issue in the near future.

STATE OF NORTH CAROLINA v. RODERICK MAURICE CROWELL, DEFENDANT

No. COA09-635

(Filed 1 June 2010)

Search and Seizure— motion to suppress—informant's tip—reasonable suspicion—investigatory stop

The trial court did not err in a trafficking in cocaine by possession and possession of a firearm by a felon case by denying defendant's motion to suppress the evidence obtained by officers from the stop of his vehicle based on an informant's tip. The police chief had known the informant personally for thirteen years, and he was able to confirm with the county drug task force that the informant's previous information was reliable and had resulted in an arrest. The totality of circumstances gave the officers a reasonable articulable suspicion that defendant was transporting drugs, and thus probable cause to arrest and search defendant's vehicle.

Appeal by defendant from judgment entered 16 October 2008 by Judge James F. Ammons, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 28 October 2009.

STATE v. CROWELL

[204 N.C. App. 362 (2010)]

*Faith S. Bushnaq for defendant.**Attorney General Roy Cooper, by Assistant Attorney General J. Allen Jernigan, for the State.*

ELMORE, Judge.

Roderick Crowell (defendant) pled guilty to one count of trafficking in cocaine by possession and one count of possession of a firearm by a felon. This appeal arises from the denial of defendant's motion to suppress the evidence obtained by police officers from the stop of his vehicle.

The evidence at the motion to suppress hearing tended to show the following: On 29 February 2008, Chief Kenneth Edwards of the Benson Police Department received a phone call from a confidential informant concerning defendant. The informant stated that a black male would arrive at a carwash on Highway 301 in Benson just a few minutes after the phone call, that the man would be driving a black Lexus SUV, and that the man was in possession of cocaine. The informant indicated to Chief Edwards that he had seen the cocaine.

Chief Edwards had known the informant for thirteen years, since the informant was a child, and he knew his mother and other family members. Additionally, a month before the events at hand, the informant had provided information to Chief Edwards about illegal drug activity that had proved reliable and resulted in an arrest by the Johnston County Drug Force.¹

Upon receiving the informant's phone call, Chief Edwards and three other officers immediately went to the carwash, set up surveillance, and waited for the black SUV to arrive. Fifteen minutes after the informant's phone call, a black Lexus SUV pulled into the carwash and parked. The informant was also at the carwash, and he called Chief Edwards to confirm that the black Lexus SUV was the correct one and that defendant was the driver. After being parked for two minutes with no one exiting the vehicle, the SUV left the carwash traveling north on Highway 301. Chief Edwards directed Sergeant Danny Lucas, who was in another car, to stop the vehicle for further investigation.

Sergeant Lucas and Officer Michael Smith pulled over the SUV. Officer Smith asked the driver for his license; the name on the license

1. The tip concerned activity outside of Benson, and was therefore not acted upon by Chief Edwards himself, but rather passed on to the Johnston County Drug Force. Those officers informed Chief Edwards that the tip had proven reliable.

STATE v. CROWELL

[204 N.C. App. 362 (2010)]

was Roderick Crowell. After telling defendant that he was suspected of possessing illegal narcotics, Officer Smith asked if there were any guns or drugs in the vehicle. Defendant replied there were not, and, upon Officer Smith's request, defendant gave his consent to search the vehicle. Officer Smith asked defendant to step out of the vehicle; he then performed a protective pat down of defendant, but found no weapon. During these interactions, Officer Smith noticed that defendant seemed to adjust the front of his pants a few times. Then, while Chief Edwards was speaking with defendant, he saw a clear plastic bag filled with white powder that appeared to be cocaine fall down defendant's pant leg and out by his feet. Chief Edwards patted defendant down again and found another bag of cocaine in defendant's pants. Officer Smith then placed defendant under arrest. Upon searching the vehicle after the arrest, Officer Smith found a loaded gun and electronic scales.

Following the trial court's denial of his motion to suppress all evidence seized from the stop of the vehicle, defendant reserved his right to appeal the ruling and pled guilty to the charges. Defendant argues that the trial court erred in denying his motion to suppress because his constitutional rights were violated by the illegal stopping of his vehicle—specifically, that the informant's tip was too vague to support a reasonable suspicion to stop defendant's vehicle. We disagree.

"The standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Smith*, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003) (quotations and citation omitted). Where the trial court's conclusions of law are supported by its factual findings, this Court will not disturb those conclusions. *State v. Logner*, 148 N.C. App. 135, 138, 557 S.E.2d 191, 193-94 (2001).

Defendant failed to assign error to any findings of fact; therefore, our review is limited to deciding whether the trial court's findings of fact support its conclusions of law. *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998) (holding that if appellant fails to assign error to findings of fact, those findings are "presumed to be correct"); *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591-92, 525 S.E.2d 481, 484 (2000).

Defendant argues that the investigative stop of his vehicle violated his constitutional rights under the Fourth Amendment of the

STATE v. CROWELL

[204 N.C. App. 362 (2010)]

United States Constitution and Article I of the North Carolina Constitution. Specifically, defendant argues that the informant's tip lacked sufficient reliability and specificity to constitute reasonable suspicion to stop defendant. We disagree.

The Fourth Amendment of the United States Constitution and Article I, Section 20, of the North Carolina Constitution prohibit unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. 1, § 20. These constitutional limitations apply to "brief investigatory detentions such as those involved in the stopping of a vehicle." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citation omitted). Only unreasonable investigatory stops are unconstitutional. *Terry v. Ohio*, 392 U.S. 1, 9, 20 L. Ed. 2d 889, 899 (1968).

"A warrantless search may be conducted incident to a lawful arrest if probable cause to arrest exists prior to the search and the arrest is permitted by law." *State v. Collins*, 160 N.C. App. 310, 314, 585 S.E.2d 481, 485 (2003) (citation omitted). When an informant's tip is involved, whether the tip constituted probable cause for the search is evaluated by a totality of the circumstances test. *Id.* at 314-15, 585 S.E.2d at 485 (establishing totality of the circumstances as the test under North Carolina Constitution); *see also Illinois v. Gates*, 462 U.S. 213, 233, 76 L. Ed. 2d 527, 545 (1983) (setting out the same test for the United States Constitution). Specifically, the reliability of that tip must be weighed. *State v. Chadwick*, 149 N.C. App. 200, 203, 560 S.E.2d 207, 209 (2002). "[I]ndicia of reliability may include (1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be and was independently corroborated by the police." *Collins*, 160 N.C. App. at 315, 585 S.E.2d at 485. Further, "[t]he fact that statements from the informants in the past had led to arrests is sufficient to show the reliability of the informants." *State v. Arrington*, 311 N.C. 633, 642, 319 S.E.2d 254, 260 (1984) (citing *State v. Hayes*, 291 N.C. 293, 230 S.E.2d 146 (1976)).

In the present case, defendant first argues that none of the officers had an independent basis upon which to classify the informant as reliable. Defendant directs us to *State v. Hughes*, where one detective told another about a tip that he had received from "a confidential and reliable informant." 353 N.C. 200, 204, 539 S.E.2d 625, 628 (2000). The arresting detective knew nothing about the informant except for a "conclusory statement [from a captain at a neighboring police department] that the informant was confidential and reliable[.]" and there were no other indications of reliability. *Id.* at 204, 539 S.E.2d at

STATE v. CROWELL

[204 N.C. App. 362 (2010)]

629. The Supreme Court held that “[s]ome objective proof as to why this informant was reliable and credible” other than a statement passed through intermediaries “must support [the officers’] decision to conduct a search.” *Id.* at 204, 539 S.E.2d at 628-29. In contrast, Chief Edwards had known the informant for thirteen years, including as a child; he knew that the informant had provided previous information about illegal drug activity that had yielded an arrest about a month before. Chief Edwards’s familiarity with the informant weighs in favor of the informant’s reliability.

Second, defendant argues that the informant’s tip should be analyzed as an anonymous tip, meaning it would require “corroboration by the police” of the information supplied in order to be deemed reliable. *Id.* at 205, 539 S.E.2d at 629. In support of this argument, defendant points to the informant’s actions not being against penal interest and the money earned for assisting the police. However, the anonymous tip standard is appropriate only for informants who are indeed anonymous, not an informant known personally by the investigating officer, and who has provided accurate information in the past that the officer knows has led to an arrest. *See id.* at 204, 539 S.E.2d at 629. Here, Chief Edwards had known the informant personally for thirteen years, and he was able to confirm with the Johnston County Drug Task Force that the informant’s previous information was reliable and had resulted in an arrest. Therefore, we decline to analyze this case under the standard for anonymous informants.

Third, defendant argues that nothing in the record indicates that the informant had any basis to know about the contraband about which he told officers. Defendant argues that there was “no evidence as to the basis for the informant’s knowledge,” such as how the informant came by the information or that the informant “was considered to have knowledge of ongoing criminal activity.” Though this was an essential factor under a previous test, this factor is not determinative in the totality of circumstances test. *Arrington*, 311 N.C. at 638, 319 S.E.2d at 257-58. This informant was able to provide “detailed information of the future action of third parties ordinarily not easily predicted[,]” a circumstance that strongly supports the tip’s reliability. *State v. Trapp*, 110 N.C. App. 584, 591, 430 S.E.2d 484, 488 (1993); *see also Alabama v. White*, 496 U.S. 325, 332, 110 L. Ed. 2d 301, 310 (1990) (holding that a tip is more reliable when it contains such information and, “[w]hen significant aspects of the caller’s predictions [are] verified, there [is] reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the

STATE v. CROWELL

[204 N.C. App. 362 (2010)]

stop”). Here, informant’s tip provided specific information about defendant’s future actions, including correctly predicting his mode of transportation, his destination, and his time of arrival. This information, after it was corroborated by the police, sufficiently demonstrated that the informant had inside knowledge about the suspect, giving them reasonable suspicion to believe that the rest of his tip, concerning defendant’s transportation of cocaine, was also accurate.

Finally, we agree with the State that the case at hand shares a number of features with *State v. Leach*, 166 N.C. App. 711, 603 S.E.2d 831 (2004), where this Court found that probable cause existed where the evidence tended to show the following facts:

the police were alerted to a drug sale by an informant who had previously given information that led to an arrest and the confiscation of multiple kilograms of cocaine. . . . The informant described the defendant and his vehicle, accurately described when and where the defendant would arrive to deliver the cocaine to the informant, and made a contemporaneous identification as defendant pulled into the parking lot.

Id. at 716, 603 S.E.2d at 835. This Court concluded that “[t]he police officers reasonably relied on information provided them by the informant, which provided probable cause to stop and search defendant.” *Id.* Likewise, in the present case, Chief Edwards received a tip from an informant who had previously given information that led to an arrest; the informant was able to give police a description of defendant’s vehicle and the time defendant would arrive at a specified location; and the informant was able to make a contemporaneous identification as defendant arrived at the location. This Court found that the facts in *Leach* gave rise to probable cause to stop and search the defendant; we find the same to be true here.

Here, officers had a reasonable articulable suspicion that defendant was involved in illegal activity at the time they stopped his vehicle for an investigative stop. The evidence shows: (1) a confidential informant who had previously provided reliable information told police that defendant would be transporting cocaine that day and described the specific vehicle defendant would be driving; (2) the informant indicated to police that he had seen cocaine in defendant’s possession; (3) a car matching the informant’s description arrived at the designated location at the approximate time indicated by the informant; and (4) the informant, waiting at the specified location, called police to confirm that the driver of the vehicle was

STATE v. CROWELL

[204 N.C. App. 362 (2010)]

defendant. The totality of the circumstances gave the officers a reasonable articulable suspicion that defendant was transporting drugs, and thus probable cause to arrest and search defendant's car. Therefore, we hold that the vehicle stop did not violate defendant's federal or state constitutional rights. The trial court's denial of the motion to suppress was proper, and we therefore affirm the order of the trial court.

Affirmed.

Judges STEELMAN and HUNTER, JR., Robert N., concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 JUNE 2010)

BLACKBURN v. DUKE UNIV. No. 09-1019	Indus. Comm. (444529)	Affirmed
EVERETT v. N.C. DEPT OF TRANSP. No. 09-1101	Indus. Comm. (TA-18994) (TA-18993)	Affirmed
FOLLUM v. N.C. STATE UNIV. No. 09-1466	Wake (08CVS15081)	Affirmed
IN RE C.B. No. 09-1248	Durham (08JB32)	Affirmed; Remanded
IN RE C.E.L. No. 10-174	Mecklenburg (08JT474-476)	Affirmed
IN RE C.L.T. No. 09-1713	Lincoln (07JT146-147)	Affirmed
IN RE I.S.W. No. 09-1577	Wake (08JT220)	Affirmed
IN RE J.D.W-S. No. 10-42	New Hanover (09JA76)	Affirmed
IN RE K.C.P. No. 09-1708	Catawba (08JT185)	Affirmed
IN RE K.O.L. No. 09-1699	Rutherford (08JA17-19)	Affirmed
IN RE K.Q.R. No. 10-41	Martin (08JA43-44)	Affirmed
IN RE M.A.F. No. 09-1651	Onslow (09J67)	Reversed
IN RE MOBLEY No. 09-1374	Hertford (09R33)	Affirmed
IN RE O.M.B. No. 10-66	Cumberland (06JT366)	Affirmed
IN RE P.C.H. No. 10-89	Rutherford (05JT80)	Reversed and Remanded
IN RE T.L.P. No. 09-1564	Catawba (08JT57) (08JT55) (08JT56)	Affirmed
IN RE WILL OF AIKEN No. 09-913	Mecklenburg (04SP4284)	No Error

J.T. ENTER. v. COUNTRYWIDE HOME LOANS No. 09-843	Durham (08CVS6238)	Affirmed
LYNN v. GUILFORD CNTY. SCH. No. 09-1061	Indus. Comm. (227414)	Affirmed
STATE v. BATTLE No. 09-1154	Pitt (08CRS52944)	No Error
STATE v. CAMPBELL No. 09-992	Pitt (07CRS11901-06)	No Error
STATE v. COLLINS No. 09-1001	Guilford (08CRS78307-08) (08CRS78335) (08CRS77780-81) (08CRS78312-13) (08CRS77772-73) (08CRS78339) (08CRS77784) (08CRS78331) (08CRS77776-77) (08CRS78343)	Affirmed
STATE v. DELGADO No. 09-973	New Hanover (05CRS20785) (05CRS20784)	No Error
STATE v. DEPAULIS No. 09-1212	Forsyth (07CRS58733)	No Error
STATE v. DICKERSON No. 09-1380	Wake (06CRS11064)	No prejudicial error
STATE v. EVANS No. 09-1104	Mecklenburg (08CRS66959) (08CRS220952) (08CRS220950)	No error in part, vacated and remanded in part
STATE v. GREGORY No. 09-1124	New Hanover (08CRS53927)	No Error
STATE v. HARRIS No. 09-1219	Guilford (02CRS105190) (07CRS101821)	Affirmed
STATE v. JOHNSON No. 09-352	Forsyth (06CRS61027)	No Error
STATE v. MARTIN No. 09-1195	Mecklenburg (06CRS244231)	Affirmed
STATE v. McCOY No. 09-827	Harnett (07CRS51839) (07CRS51838)	No Error

STATE v. MORA-AVILA No. 09-852	Mecklenburg (08CRS215762) (08CRS215761)	No Error
STATE v. OATES No. 09-1420	Henderson (07CRS52910) (07CRS51929)	Affirmed
STATE v. OXENDINE No. 09-1185	Davidson (07CRS54865)	No Error
STATE v. PENDLETON No. 09-1134	Davie (08CRS50787) (08CRS1696)	No Error
STATE v. ROMINGER No. 09-855	Forsyth (08CRS50513) (07CRS62799)	No Error
STATE v. SHELLEY No. 09-1265	Mecklenburg (07CRS235911-14)	No prejudicial error
STATE v. SIMMONS No. 09-1170	Guilford (08CRS78402) (08CRS23168) (08CRS702131)	No Error
STATE v. STANLEY No. 09-958	Guilford (07CRS102226) (07CRS102223)	No Error
STATE v. WEATHERSPOON No. 09-1189	Onslow (07CRS56658) (07CRS56655)	New trial
STATE v. WILSON No. 09-815	Moore (08CRS51033) (08CRS51034) (08CRS51032) (08CRS1898)	No Error
STATE v. WILSON No. 09-1438	Person (08CRS51750)	Dismissed
STATE v. WYNN No. 09-1208	Union (07CRS53688-90)	No Error in part, vacate in part, and remand for entry of judgment and re- sentencing con- sistent with this opinion
THE N.C. STATE BAR v. HUNTER No. 09-1014	Disciplinary Hearing Commission (08DHC21)	Affirmed

WALKER v. UNITED PARCEL SERV. No. 09-1463	Indus. Comm. (580931)	Affirmed
WHITE v. OBLINGER No. 09-694	Wake (08CVS12703)	Affirmed
WIRTH v. WIRTH No. 09-1037	Mecklenburg (03CVD20151)	Affirmed

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

DONALD C. McCASKILL, PLAINTIFF-APPELLANT v. DEPARTMENT OF STATE
TREASURER, RETIREMENT SYSTEMS DIVISION, DEFENDANT-APPELLEE

No. COA09-778

(Filed 15 June 2010)

1. Administrative Law— judicial review of agency decision—failure to adopt findings of fact

The Board of Trustees of the Teachers' and State Employees' Retirement System did not commit prejudicial error by failing to adopt certain of the administrative law judge's findings of fact including numbers 29, 30, 31, 33, 34, 36, 37, 38, 39, 40, and 41 in a case determining that petitioner was not eligible for long-term disability benefits because he had not accumulated five years of membership service in the retirement system.

2. Pensions and Retirement— settlement agreement—long-term disability benefits—eligibility under state retirement system—unpaid leave inapplicable

The trial court did not err by concluding that the parties' settlement agreement did not provide petitioner with sufficient "membership service" to render him eligible to receive long-term disability benefits under the State Retirement System. Generally, an employee gets a day's credit for a day's work. Eligibility for long-term disability benefits does not include periods when an employee is on unpaid leave. Further, 25 N.C.A.C. 1B.0436 requires the submission of a settlement agreement to the Office of State Personnel for approval, and Department of Health and Human Services was not entitled to provide petitioner with binding assurances that the retirement system would accept the approach adopted in the settlement agreement.

3. Contracts— settlement agreement—eligibility under state retirement system—State only liable upon contracts authorized by law

Petitioner was not entitled to enforce a settlement agreement against the State Retirement System regardless of his eligibility for such benefits. The mere fact that petitioner and Department of Health and Human Services entered into a contract that both parties hoped would render petitioner eligible to receive long-term disability benefits did not automatically entitle him to receive such benefits. Although the State is bound by its contracts, it is liable only upon contracts authorized by law.

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

4. Estoppel— settlement agreement—no justifiable reliance

The State Retirement System was not estopped from denying petitioner's claim for long-term disability benefits, and the trial court did not err by concluding that neither the elements of estoppel nor quasi-estoppel were present in this case. The failure of the parties to submit the settlement agreement for approval by the Office of State Personnel as required by 25 N.C.A.C. 1B.0436 or consult with the Retirement System precluded anyone from justifiably relying on the beliefs of the relevant Department of Health and Human Services officials that the approach adopted in that agreement would pass muster with the Retirement System.

Judge ROBERT C. HUNTER dissenting.

Appeal by petitioner from order entered by 23 February 2009 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 18 November 2009.

Stark Law Group, PLLC, by Thomas H. Stark and Seth A. Neyhart, for petitioner-appellant.

Attorney General Roy A. Cooper, by Special Deputy Attorney General Robert M. Curran, for respondent-appellee.

ERVIN, Judge

Petitioner Donald C. McCaskill appeals from the trial court's 23 February 2009 order affirming the Final Decision of the Board of Trustees of the Teachers' and State Employees' Retirement System, in which the Board determined that Petitioner was not eligible for long-term disability benefits because he had not accumulated five years of membership service in the Retirement System. After careful consideration of Petitioner's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Statement of Facts

A. Substantive Facts

Petitioner entered the employment of the DHHS as a Physician's Assistant at Dorothea Dix Hospital in October, 1997. At that point, he began contributing to the Retirement System. On 6 December 2001, DHHS terminated Petitioner from its employment. As of that date, Petitioner had four years and three months of membership service in the Retirement System.

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

Shortly after his termination, Petitioner began the process of challenging his dismissal. By the time that Petitioner reached Step 3 of the grievance process, he had experienced a complete, permanent hearing loss. Based upon his hearing loss, Petitioner "sought short-term disability benefits." In response to his application for short-term disability benefits, DHHS certified that Petitioner had accrued thirty days of vacation and forty-two days of sick leave as of 6 December 2001.

Before a Step 3 evidentiary hearing could be held, Petitioner and DHHS signed a settlement agreement which provided, in pertinent part, that:

WHEREAS, all parties have agreed that [Petitioner] be reinstated to employment with [DHHS] for the purpose of allowing him to use his accumulated sick and vacation leave hours to maintain his employment until he has attained five (5) years of contributing service in the Retirement System for Teachers and State Employees.

THEREFORE, IT IS HEREBY AGREED AS FOLLOWS:

1. [Petitioner's] December 6, 2001, dismissal from employment at [DHHS] shall be rescinded.

2. [Petitioner] shall be reinstated to a full-time permanent position, effective December 7, 2001. From December 7, 2001, through December 31, 2001, [Petitioner] shall be in full-time employment status (40 hours per week) and will use his accumulated sick and vacation leave to cover that time. From January 1, 2002, until September 9, 2002, and for 3 ½ hours on September 9, 2002, [Petitioner] will be placed on three-quarter time (30 hours per week) during which time he will exhaust his accumulated sick and vacation leave; provided, the total number of work days from January 1, 2002, through September 9, 2002, for which [Petitioner] does not have sufficient sick or vacation leave will be equally apportioned to each month during this period and treated as leave without pay.

. . . .

5. [DHHS] recognizes that [Petitioner] may file for temporary and permanent disability pay and [DHHS] agrees not to oppose and cooperate in attempting to obtain such disability status.

. . . .

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

6. [Petitioner] shall voluntarily withdraw his pending grievance against [DHHS] and shall waive any and all appeal rights he might have under State and Federal law arising out of his December 6, 2001, separation from [DHHS] employment.

7. [Petitioner] shall submit to [DHHS] prior to or within thirty (30) days from the execution of this Agreement, a written resignation from employment, effective September 9, 2002.

According to the trial court's findings, the settlement agreement sought to take advantage of the fact that the Retirement System generally gave a month's credit for each month in which the employee worked in determining his or her eligibility for benefits. As the trial court noted, "[t]he agreement did not provide for Petitioner to ever actually return to work," "and Petitioner did not in fact return to work."

Although this settlement agreement was signed by Petitioner and DHHS Secretary Carmen Hooker Odom, it was never reviewed or approved by the Office of State Personnel or the Retirement System. According to Marshall Barnes, who served as Deputy Director of the Retirement Systems Division, the Retirement System would not have approved this settlement agreement had it been submitted for approval. Similarly, Drake Maynard of the Office of State Personnel testified that "the rescission of [Petitioner's] dismissal, his reinstatement, any change in salary and the change from a forty-hour position to a thirty-hour position all require[d] the processing of personnel action forms."

According to the ALJ decision, DHHS officials did, however, review the settlement agreement for compliance with State Personnel and Retirement System rules. Bill Guy, Assistant Human Resources Director and Employee Relations Manager for DHHS, reviewed the settlement agreement to ensure its compliance with State Personnel rules governing settlements and consulted with Carolyn Williams and Dianne Hoffman, both of whom were long-time DHHS employees with knowledge of human resource issues, "to ensure that the settlement agreement complied with the applicable North Carolina rules, statutes, and regulations on retirement issues." Mr. Guy relied on Ms. Williams' assurances that the settlement agreement did not violate any retirement-related rules, statutes, or regulations and would not have approved the settlement agreement if he had thought that it did.

After the execution of the settlement agreement, Petitioner was retroactively reinstated to his position on a 40 hour per week basis

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

from 7 December 2001 through 31 December 2001. Beginning on 1 January 2002, Petitioner was treated as a 30 hour per week employee. According to the trial court, “pay forms were created after the fact which show that Petitioner was paid a lump-sum total of \$20,296.40 for 16 days in January, 11 days in February, 11 days in March, 12 days in April, 12 days in May, 11 days in June, 13 days in July, 13 days in August and 6 days in September,” with the “remaining days in each month shown as ‘leave without pay.’” Although no retirement contributions were made on Petitioner’s behalf for the months of January through June, 2002, a relatively large contribution was made in the month of July and “a written statement showing that the retirement contributions made in July represented salary paid to Petitioner for the months of January through July” was submitted in “approximately September 2002.”

B. Procedural Facts

In February, 2003, Petitioner applied to the Retirement System for long-term disability benefits. At that time, he certified that his last actual day of work was 6 December 2001 and that his “date of termination from permanent full-time employment” was 9 September 2002. DHHS certified that the last day that Petitioner worked and the date upon which his disability began was 6 December 2001.

The Retirement System initially processed Petitioner’s application for long-term disability benefits and approved his application. However, after a Retirement System benefits analyst reviewed Petitioner’s application, she questioned his service eligibility. On 29 August 2003, the Retirement System notified Petitioner that he lacked the five years of membership service necessary to make him eligible for long-term disability benefits on the grounds that “the days of unused, accrued paid leave which Petitioner had purportedly exhausted from January to September 2002 totaled 104 days which, if exhausted continuously, would have covered the period only from January to May, thus providing five months of service rather than the nine months which Petitioner” claimed to have earned. After an exchange of correspondence with Petitioner and his counsel, the Retirement System denied Petitioner’s request for long-term disability benefits on 17 December 2004.

On 5 February 2005, Petitioner filed a contested case petition with the Office of Administrative Hearings for the purpose of challenging the Retirement System’s denial of his request for long-term disability benefits. On 4 January 2008, Melissa Owens Lassiter,

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

Administrative Law Judge, issued a Decision determining that the Retirement System should “REVERSE its initial decision to deny Petitioner long-term disability benefits, and grant Petitioner long-term disability benefits.” On 28 April 2008, the Board issued a Final Decision stating that “Petitioner did not have five years of membership service when he applied for long-term disability benefits.”

On 3 July 2008, Petitioner filed a Petition for Judicial Review seeking review of the Board’s Final Decision by the Superior Court of Durham County. On 23 February 2009, the trial court entered an Order finding “that Petitioner did not have five years of membership as a result of the July 2002 settlement agreement with DHHS, and therefore the Retirement System properly denied his application for long-term disability benefits on that basis.” On 20 March 2009, Petitioner noted an appeal to this Court from the trial court’s order.

II. Legal Analysis

A. Standard of Review

Since the present case is before us on appeal from a trial court order reviewing the decision of an administrative agency, “[t]he scope of review to be applied by the appellate court . . . is the same as it is for other civil cases.” N.C. Gen. Stat. § 150B-52. “ ‘When this Court reviews appeals from superior court either affirming or reversing the decision of an administrative agency, our scope of review is twofold . . . : (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard.’ ” *Corbett v. N.C. Div. of Motor Vehicles*, 190 N.C. App. 113, 118, 660 S.E.2d 233, 237 (2008) (quoting *Mayo v. N.C. State Univ.*, 168 N.C. App. 503, 507, 608 S.E.2d 116, 120 (2005)). As a result, the nature and extent of our review under N.C. Gen. Stat. § 150B-52 is heavily dependent upon the scope of review applicable to the Superior Court in administrative review proceedings.

Generally speaking, the scope of review applicable to Superior Courts engaged in the review of administrative agency decisions is set out in N.C. Gen. Stat. § 150B-51(b), which provides that:

Except as provided in subsection (c) of this section, in reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency’s decision, or adopt the administrative law judge’s decision if the substantial rights of the petitioners may have been

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §§] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

However, N.C. Gen. Stat. § 150B-51(c) provides that:

In reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with [N.C. Gen. Stat. §] 150B-34(a), and the agency does not adopt the administrative law judge's decision, the court shall . . . not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record. The court reviewing a final decision under this subsection may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency for further explanations under [N.C. Gen. Stat. §§] 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the agency's failure to provide the explanations; and make take any other action allowed by law.

Since the Board did not adopt the ALJ's decision in its Final Decision, N.C. Gen. Stat. § 150B-51(c) applies to this case. In cases governed by N.C. Gen. Stat. § 150B-51(c), "[t]he trial court's findings of fact should be upheld if supported by substantial evidence." *Corbett*, 190 N.C. App. at 119, 660 S.E.2d at 238 (citing *Ramsey v. N.C. Div. of Motor Vehicles*, 184 N.C. App. 713, 716, 647 S.E.2d 125, 127 (2007)). As a result of the fact that the trial court correctly recognized that this case was governed by N.C. Gen. Stat. § 150B-51(c) and "conducted a *de novo* review of the official record," our task on appeal in this case

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

is to determine whether the trial court properly applied the applicable standard of review.

B. Substantive Legal Issues

1. Sufficiency of Trial Court's Findings of Fact

[1] Pursuant to N.C. Gen. Stat. § 150B-36(b), an agency making a final decision in a contested administrative proceeding, such as the one at issue here, “shall adopt each finding of fact contained in the administrative law judge’s decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses.” N.C. Gen. Stat. § 150B-36(b). “For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail” “[t]he reasons for not adopting the findings of fact” and “[t]he evidence in the record relied upon by the agency in not adopting the finding of fact contained in the administrative law judge’s decision.” N.C. Gen. Stat. § 150B-36(b1). “For each finding of fact that is not contained in the administrative law judge’s decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact,” with “[a]ny new finding of fact made by the agency [to] be supported by a preponderance of the admissible evidence in the record.” N.C. Gen. Stat. § 150B-36(b2). “Except as provided in N.C. Gen. Stat. § 150B-34(c), the agency shall adopt the decision of the administrative law judge unless the agency demonstrates that the decision of the administrative law judge is clearly contrary to the preponderance of the admissible evidence in the record” and “set[s] forth its reasoning for the decision in light of the findings of fact and conclusions of law in the final decision, including any exercise of discretion by the agency.” N.C. Gen. Stat. § 150B-36(b3). On appeal, Petitioner contends that the Board violated N.C. Gen. Stat. §§ 150B-36(b1), (b2), and (b3) in a number of instances.¹ After care-

1. The trial court did not address Petitioner’s challenges to the Board’s failure to adopt various findings of fact made by the ALJ in its order. As a result of the fact that noncompliance with N.C. Gen. Stat. §§ 150B-36(b1), (b2), or (b3) would constitute a procedural error cognizable pursuant to N.C. Gen. Stat. § 150B-51(c), the trial court should have addressed Petitioner’s challenges to the Board’s compliance with these statutory provisions in its order. However, the trial court’s failure to correctly apply the applicable “standard of review does not automatically necessitate remand, provided the appellate court can reasonably determine from the record whether petitioner’s asserted grounds for challenging the agency’s final decision warrant reversal or modification of that decision under the applicable provisions of” N.C. Gen. Stat. § 150B-51. *N.C. Dept. of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004). Given that we are able to adequately review Petitioner’s challenges to the

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

fully reviewing the Board's order, however, we are unable to conclude that it committed prejudicial error in failing to adopt certain of the administrative law judge's findings.²

First, Petitioner challenges the Board's rejection of Finding of Fact No. 29, in which the ALJ found that, "[i]n its December 17, 2004 letter to Petitioner's attorney, Mr. Barnes acknowledged that Respondent Division 'does not contest the actions that placed [Petitioner] on three-quarter time effective January 1, 2002;'" that "Respondent did not contest that Petitioner was an 'employee' as that term is defined in N.C. Gen. Stat. § 135-1(10) (2002);" and that "the validity of the settlement agreement and Petitioner's status as an 'employee' are not in dispute." The Board rejected Finding of Fact No. 29 because:

it is not supported by the testimony presented and . . . it makes a conclusion as to the validity of the settlement agreement [that] is without support in the evidence. The ALJ found that "Respondent did not contest that Petitioner was an 'employee' as that term is defined (T pp. 131, 139) Thus, the validity of the settlement agreement and Petitioner's status as an 'employee' are not in dispute." The Board finds that the transcript pages referenced show that former Deputy Retirement Director Marshall Barnes testified that a person must be in a permanent full-time position to qualify for membership in the Retirement System, and the System did not dispute that Petitioner was initially reinstated to a permanent full-time position which would qualify for retirement service credit. The validity of the settlement agreement was in dispute in this case, however; the cited portions of the transcript make no reference to the validity or invalidity of that agreement.

Although Petitioner contends that the Board erred by concluding that the validity of the settlement agreement was in dispute, the validity of

Board's compliance with N.C. Gen. Stat. §§ 150B-36(b1), (b2), and (b3), we do not need to remand this case to the trial court for consideration of this aspect of Petitioner's challenge to the Board's decision.

2. In addition to his specific challenges to the Board's order, Petitioner argues that "the strident adversarial tone in the findings was entirely inappropriate" and that "its order seems to bristle at these independent findings in sweeping, argumentative and vehement language exhibiting a pervasive arbitrariness and prejudice against contrary facts which would undermine its predetermined result." Although the Board did use strong language in rejecting at least one of the administrative law judge's findings of fact, nothing in N.C. Gen. Stat. § 150B-51(c) or N.C. Gen. Stat. § 150B-52 suggests that the use of such language, standing alone, constitutes an independent basis for granting relief on appeal.

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

that agreement lies at the heart of the dispute between the parties. As a result, the Board did not err by declining to adopt Finding of Fact No. 29.

The ALJ found in Finding of Fact No. 30 that:

Respondent contended that the retirement contributions detailed in the settlement agreement between DHHS and Petitioner were not an approved method for Petitioner to receive retirement service credit with Respondent. At [the] hearing, Mr. Barnes explained that Respondent did not accept Petitioner's settlement agreement, because:

Petitioner did not have enough sick leave and vacation leave to get him to five years by exhausting that continuously, then there would have been a problem, but there was an inherent manipulation here to play the system to get him . . . to qualify him for the benefit.

The Board declined to accept Finding of Fact No. 30 because it "misquotes the testimony of Mr. Barnes and otherwise misrepresents the testimony of the witness." Instead, the Board found that "the Retirement System determined that the settlement agreement was ineffective to provide Petitioner with five years of membership service, not because it was 'not an approved method for Petitioner to receive retirement credit with Respondent' but because it was contrary to statute." Although Petitioner contends that the Board mischaracterized Mr. Barnes' testimony, the record reflects that Mr. Barnes testified that, if Petitioner had had sufficient "sick leave and vacation leave to get him to five years by exhausting that continuously, then there would not have been a problem," and that the settlement agreement did not provide Petitioner with five years of membership service because it was contrary to statute. As a result, we do not believe that the Board erred by declining to adopt the ALJ's Finding of Fact No. 30.

The ALJ found in Finding of Fact No. 31 that "Barnes also acknowledged that the personnel policies have changed over time, and he didn't know exactly what the policy was, that was in effect at that time [2001-2002]." The Board declined to adopt Finding of Fact No. 31 because "it is irrelevant whether Barnes knew or did not know what personnel policies were in effect in 2001-02." Although Petitioner argues that the Board lacked the authority to reject a finding of fact on relevance grounds and contends that credibility determinations are the province of the ALJ rather than the agency, we see

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

no reason why an agency may not reject a factual finding as irrelevant, particularly where, as here, the contents of the applicable personnel policy and the date upon which it became effective are not in doubt. Furthermore, we do not believe that the Board's decision to reject Finding of Fact No. 31 as irrelevant involved any sort of impermissible credibility determination. Thus, we do not believe that the Board erred by rejecting Finding of Fact No. 31.

The ALJ found in Finding of Fact No. 33 that:

According to Mr. Barnes, there was no verification in Petitioner's member file that DHHS or Petitioner had consulted Respondent about the settlement agreement before Petitioner and DHHS executed that agreement. Barnes did not find a copy of the settlement agreement between Petitioner and DHHS in Petitioner's member record when he received Petitioner's attorney[s] November 7, 2003 letter. (T pp. 105, 119) As a result, Barnes explained that he did not give prior approval to the agreement or talk with anyone at DHHS about the proposed settlement agreement. (T p 107) However, Barnes' testimony is inconsistent with his December 17, 2004 letter to Petitioner's attorney when he wrote:

I have received Mr. McCaskill's member record and find that the first copy of the settlement agreement we received was received after it was executed by all parties and was received on July 8, 2002.

(R Ex 6, p 2) Additionally, Barnes opined that had the parties asked him to approve the subject agreement, he would not have approved such an agreement. (T-1, pp. 107-08, 118, 126)

The Board rejected Finding of Fact No. 33 "on the basis that it misrepresents the entirety of the oral and written evidence provided at the hearing." According to the Board, Barnes testified on four different occasions that he first saw the settlement agreement at the time that he received a letter from Petitioner's counsel in November, 2003. On the other hand, the Board noted that "[n]either counsel for the Petitioner, counsel for Respondent, nor the ALJ questioned Barnes about the discrepant date in the letter or provided Barnes any opportunity to explain the 2002 date" and that "Petitioner presented no evidence that the agreement had been submitted prior to November 2003." For that reason, the Board found "that the evidence presented at the hearing was overwhelming and clear and that the first time the

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

settlement agreement was submitted to the Retirement System was in November 2003.” Although Petitioner argues that the Board failed to give deference to the ALJ’s credibility determination, the Board made a finding that was tantamount to the required determination that the ALJ’s decision was contrary “to the preponderance of the admissible evidence.” N.C. Gen. Stat. § 150B-36(b1). As a result, we do not believe that the Board erred by failing to adopt the ALJ’s Finding of Fact No. 33.

The Board also declined to adopt the ALJ’s Finding of Fact Nos. 34 and 36, which provided that:

34. A preponderance of the evidence established that since at least 1982, Respondent’s practice is to grant a member a full month retirement credit for any part of the month in which the member works, and for which retirement contributions are made. Respondent authorizes this practice, although there is no statute or administrative rule which provides for such a practice.

. . . .

36. In June/July of 2002, when Petitioner and DHHS signed its settlement agreement, N.C. Gen. Stat. § 135-4(v) allowed a member of the Retirement System, who had been terminated from a covered position and later reinstated, to purchase credit for omitted service. The cost to purchase the omitted service varied depending on whether the service was purchased within 90 days of the omission, after 90 days but prior to three years, or after three years. Neither DHHS nor Petitioner requested Respondent provide, pursuant to N.C. Gen. Stat. § 135-4(v), the cost to purchase the omitted service in Petitioner’s case. (T-1, pp. 105, 140) Barnes explained that Respondent interpreted the retirement provisions so that in 2002, N.C. Gen. Stat. § 135-4(v) was the only statutory provision under which Petitioner could purchase retirement service.

The Board rejected Finding of Fact No. 34 as “an incomplete statement of the Retirement System’s practice” and found that “the Retirement System’s practice of awarding a full month of retirement credit for any part of a month worked has been applied mainly to a member’s first month of employment and last month of employment prior to retirement and would not apply, e.g., to employees who worked in a job-sharing arrangement so as to award full-time credit for half-time work.” Similarly, the Board rejected Finding of Fact No. 36 “on the grounds that it is an inexact summary of N.C. [Gen. Stat.]

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

§ 135-4(v) as well as an incomplete summary of the testimony provided.” Instead, the Board found that “the statute referenced provides for the purchase of ‘omitted membership service,’ but makes no reference to termination or reinstatement, and that this statute was the only statutory provision in effect at the time of Petitioner’s reinstatement which provided for the purchase of retroactive membership service.” Although Petitioner contends that the Board erred in rejecting Finding of Fact Nos. 34 and 36 on the theory that there is no statutory basis for rejecting factual findings made by an ALJ for “incompleteness,” we believe that a materially and misleadingly “incomplete” finding is inherently erroneous. Furthermore, Petitioner has not shown any error in the substitute findings that the Board adopted. Thus, the Board did not err by rejecting Finding of Fact Nos. 34 and 36.

The ALJ found, based on testimony from Mr. Barnes, in Finding of Fact No. 37 that, “[a]ccording to state personnel records, Petitioner was a contributing employee for 60 consecutive months.” The Board rejected Finding of Fact No. 37 because it “ha[d] no support in the evidence” given that “Barnes was not asked to testify regarding records maintained by the Office of State Personnel” and given that Petitioner was unable to obtain the introduction into evidence of “certain state personnel records” “due to the lack of any witness who could testify as to what information they contained.” Although Petitioner contends that there was ample record support for the ALJ’s initial finding, the record reflects that Mr. Barnes was not ever asked to testify concerning records maintained by the Office of State Personnel and that an objection to the admission of certain state personnel records was sustained for the reason stated by the Board. Moreover, even if State Personnel records stating that Petitioner had 60 months of continuous service had been admitted into evidence, we cannot see how the existence of such records would be determinative given the undisputed evidence concerning the dates and times that Petitioner took paid and unpaid leave after 6 December 2001. As a result, we are unable to conclude that the Board committed prejudicial error by rejecting Finding of Fact No. 37.

In Finding of Fact No. 38, the ALJ found, based on testimony by Mr. Guy, that, “[a]ccording to DHHS records, Petitioner was a contributing employee for 60 consecutive months.” The Board rejected Finding of Fact No. 38 on the grounds that “such a finding has no support in the evidence” since “Mr. Guy did not testify as to any records which purportedly showed Petitioner to be a contributing employee

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

for 60 months.” Although Petitioner pointed to testimony in which Mr. Guy indicated that he believed that “retirement contributions were being withheld from what [Petitioner] was being paid during those months” and that “the DHHS records as to the disputed months were made part of the record” and referenced during Mr. Guy’s testimony, he does not identify any admissible evidence indicating that DHHS records demonstrated that he “was a contributing employee for 60 consecutive months.” Moreover, even if such records had been introduced, the existence of such evidence would not establish Petitioner’s eligibility for long-term disability coverage given the undisputed nature of the evidence bearing on the number of days that he took paid and unpaid leave after 6 December 2001. Thus, the Board did not commit prejudicial error by rejecting Finding of Fact No. 38.

In Finding of Fact No. 39, the ALJ found that:

DHHS did not submit Petitioner’s settlement agreement to [the Office of State Personnel] for approval, because Guy believed that Section 7, page 45 of the State Personnel Manual did not require OSP’s approval in this instance. Specifically, he relied upon the following statement from the Manual: “This provision shall also not be construed to require approval of any settlement, the terms of which allow an employee to substitute a resignation for a dismissal and to withdraw a grievance or a contested case action.” (p. 180)

The Board rejected Finding of Fact No. 39 as “an incomplete and misleading statement of the evidence presented.” Although the Board agreed that Mr. Guy had testified that he did not seek approval of the settlement agreement based upon the provision of the State Personnel Manual quoted above, it found “that the agreement went considerably beyond having Petitioner substitute a resignation for a dismissal and withdrawing his grievance by: (1) purporting to reinstate Petitioner to his former position; (2) reallocating his position from forty hours per week to thirty hours per week; and (3) attempting to show that Petitioner alternated between pay status and pay without leave status for a portion of each month from January through August, 2002.” The Board further found that “such an agreement was required to be reviewed and approved by OSP, as provided in 25 N.C.A.C. 1B.0436 and confirmed by the testimony of Drake Maynard.” Petitioner contends that the Board erred in rejecting Finding of Fact No. 39 because the disputed finding “is an accurate representation of Guy’s testimony,” because Mr. Maynard never ad-

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

ressed the extent to which the settlement agreement had to be submitted to OSP for approval, and because the Board's disagreement with Mr. Guy's position does not constitute a valid basis for rejecting the ALJ's finding. Despite the Board's decision to reject Finding of Fact No. 39, the Board clearly confirmed the ALJ's determination that Mr. Guy did not submit the settlement agreement for OSP approval based upon the provisions of Section 7 of the State Personnel Manual. Furthermore, Petitioner does not appear to dispute the accuracy of the Board's additional findings describing the way in which the present settlement agreement differed from one which merely substituted a resignation for a termination. Finally, as Petitioner himself notes, the extent to which the settlement agreement actually had to receive OSP approval is a question of law rather than a question of fact. Thus, the Board did not err by rejecting the ALJ's Finding of Fact No. 39.

The ALJ found in Finding of Fact No. 40 that:

A preponderance of the evidence at [the] hearing proved that DHHS and Petitioner signed their settlement agreement in good faith, believing their agreement resolved Petitioner's internal grievance with DHHS, and complied with North Carolina personnel and retirement statutes, rules and regulations. Petitioner relied on the assurances of the DHHS employees and agents, and his attorney, regarding the validity of the settlement agreement. Based on such reliance, Petitioner released any and all claims against DHHS regarding Petitioner's December 6, 2001 termination.

The Board rejected Finding of Fact No. 40 as "incomplete, misleading, and contrary to the preponderance of the evidence."

Rather than showing that Petitioner and DHHS entered into the agreement in good faith that they were complying with all personnel and retirement statutes and rules, the Board finds from the preponderance of the evidence that Petitioner and DHHS entered into their agreement with disregard for personnel or retirement statutes and rules. Where either of the parties could have consulted with the Retirement System concerning the retirement issues raised by the agreed-on settlement prior to the agreement, the Board finds that neither party did so. While State Personnel rules required a settlement agreement such as the one at issue to be reviewed and approved by the State Personnel Director, according to [the] testimony of the relevant witness, the

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

Board finds that neither party submitted the agreement to OSP. And finally, where the agreement fictitiously placed Petitioner on alternating periods of paid leave and leave without pay, all in an attempt to manipulate Petitioner's records to make it appear that he qualified for State disability benefits when he in fact did not, the Board rejects any suggestion that the parties to the agreement acted in good faith that their scheme was in compliance with applicable laws.

Although Petitioner contends that the record shows that all parties thought that the settlement agreement had been approved or was acceptable to the Retirement System and that the record was devoid of any evidence tending to show that any party acted in bad faith, the undisputed evidence establishes that no party sought or obtained approval of the settlement agreement prior to its execution. Furthermore, although we might have chosen different words, the Board's conclusion that the parties to the settlement agreement were attempting to "manipulate" the Retirement System in an attempt to settle their dispute was a legitimate inference from the undisputed evidence that the parties had not consulted with or obtained approval from the Retirement System prior to entering into the settlement agreement. As a result, the Board did not err by rejecting Finding of Fact No. 40.

Finally, the ALJ found in Finding of Fact No. 41 that "[a] preponderance of the evidence showed that Respondent accepted DHHS retirement contributions on Petitioner's behalf, and never returned those contributions to Petitioner" and that Petitioner "relied on Respondent's acceptance of those retirement contributions, although after the agreement's execution as verification, that the settlement agreement between Petitioner and his employer had been approved by Respondent." The Board rejected Finding of Fact No. 41 on the grounds "that it is incomplete, misleading, irrelevant and contrary to the preponderance of the evidence." According to the Board, "DHHS submitted to the Retirement System a percentage of the salary it paid to Petitioner, just as it routinely does for all of its other employees and as required by statute," so that "[t]he issue is not whether DHHS paid and the Retirement System accepted the contributions, but whether the 72 days of leave for which Petitioner was paid could be counted as nine months of service." Although Petitioner contends, once again, that there is no statutory basis for rejecting a finding of fact on relevance grounds and that the Board failed to explain its reason for finding that Finding of Fact No. 41 was contrary to the pre-

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

ponderance of the evidence, we see no obstacle to the rejection of a finding on relevance grounds or any basis for believing that the information contained in Finding of Fact No. 41 is relevant to the ultimate issue before the Board. Moreover, Petitioner has not pointed to any portion of the record demonstrating his reliance on the Retirement System's acceptance of the contribution payment made on his behalf as an endorsement of the validity of the settlement agreement. As a result, the Board did not err by rejecting Finding of Fact No. 41.

Thus, for the reasons set forth above, we do not believe that the Board erred by failing to adopt certain of the ALJ's findings of fact. Given that fact and the fact that Petitioner has not challenged the adequacy of the record support for the factual findings made by the trial court pursuant to N.C. Gen. Stat. § 150B-51(c), we are in a position to evaluate the appropriateness of the manner in which the trial court resolved the legal issues raised by Petitioner's appeal from the Board's decision.

2. Eligibility for Long-Term Disability Benefits

[2] The initial substantive legal issue raised by Petitioner's appeal is the extent to which the arrangement worked by the settlement agreement suffices to render Petitioner eligible for long-term disability benefits under the N.C. Gen. Stat. § 135-106(a). After careful consideration of the record in light of the applicable law, we conclude that the trial court correctly determined that the settlement agreement did not provide Petitioner with sufficient "membership service" to render him eligible to receive such benefits.

According to N.C. Gen. Stat. § 135-106(a), "any beneficiary or participant who has had five or more years of membership service may receive long-term disability benefits from the Plan upon approval by the Board of Trustees[.]"

As to the requirement of five years of membership service, any participant or beneficiary who does not have five years of membership service within the 96 calendar months prior to conclusion of the short-term disability period or cessation of salary continuation payments, whichever is later, shall not be eligible for long-term disability benefits.

N.C. Gen. Stat. § 135-106(a). "[M]embership service" is defined as "service as a teacher or State employee rendered while a member of the Retirement System." N.C. Gen. Stat. § 135-1(14). The "members" of the State Teachers' and Employees' Retirement System include

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

“any teacher or State employee included in the membership of the System . . .” N.C. Gen. Stat. § 135-1(13). “Service” is defined as “service as a teacher or State employee . . .” N.C. Gen. Stat. § 135-101(17). Although the parties agree that Petitioner was a “member” of the Retirement System and that his sick and vacation leave time counts toward the calculation of his “membership service,” they disagree about the extent to which he is entitled to credit toward the five year “membership service” requirement for the time he was on leave without pay between 6 December 2001 and 9 September 2002. As a result, the ultimate issue which we must confront in this case is the extent to which the term “membership service” used in N.C. Gen. Stat. § 135-106(a) includes periods of leave without pay. In other words, we face an issue of statutory construction.

“The principal goal of statutory construction is to accomplish the legislative intent.” *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). “The best indicia of that intent are the language of the statute . . ., the spirit of the act and what the act seeks to accomplish.” *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). “The interpretation of a statute given by the agency charged with carrying it out is entitled to great weight.” *Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citing *High Rock Lake Assoc. v. Environmental Management Comm.*, 51 N.C. App. 275, 279, 276 S.E.2d 472, 475 (1981)).

Petitioner argues that, since “[p]eriods of leave without pay do not constitute a break in service,” 25 N.C.A.C. 1D.0114, he was a full time DHHS employee for 60 continuous months, thus meeting the five year “membership service” requirement. In Petitioner’s opinion, the Retirement System’s insistence that he exhaust his sick and vacation leave on a continuous basis lacked any specific statutory support and was, therefore, “arbitrary, capricious, unauthorized, unconstitutional, and contrary to the intent of the General Assembly.” Furthermore, Petitioner argues that neither N.C. Gen. Stat. § 135-4(b), (h), and (v), 25 N.C.A.C. 1E.1112, nor 25 N.C.A.C. 1B.0436 rendered the provisions of the settlement agreement ineffective because N.C. Gen. Stat. § 135-4(b) addresses sharing leave among two employees occupying the same position; N.C. Gen. Stat. § 135-4(h) appears to address leaves of absence lasting longer than one month; N.C. Gen. Stat. § 135-4(v) says nothing about the need for continuous leave exhaustion; 25 N.C.A.C. 1E.1112 “does not say that the use of short

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

term leave without pay is expressly limited to only those times where an employee has no leave credits;" and 25 N.C.A.C. 1B.0436 did not require prior approval of the present settlement agreement because it involved the substitution of a resignation for a termination notice. As a result, Petitioner argues that, given the absence of any statutory provision or regulation that directly prohibits implementation of the arrangement embodied in the settlement agreement, he is eligible for long-term disability benefits. Our dissenting colleague essentially adopts Petitioner's arguments.

The Retirement System, on the other hand, contends, in reliance on *Worrell v. N.C. Department of State Treasurer*, 333 N.C. 528, 427 S.E.2d 871 (1993), that the definition of "membership service" should be strictly construed and that retirement credit should be deemed available "at all times that [the employee] was working." *Wiebenson v. Bd. of Trustees, State Employees' Ret. Sys.*, 345 N.C. 734, 739, 483 S.E.2d 153, 155 (1997). The Retirement System contends that its decision to deny Petitioner credit for times when he was on leave without pay was fully "consistent with the statutory provisions that govern the accrual of creditable service." According to the Retirement System, the only statutory provision that would have authorized any sort of retroactive crediting of "membership service" to Petitioner was N.C. Gen. Stat. § 135-4(v), under which a reinstated employee was treated "as though [he or she] had remained continuously employed." In addition, the Retirement System notes that N.C. Gen. Stat. § 135-4(b) provides that "in no case shall more than one year of service be creditable for all services in one year," so that "a school employee in a job-sharing position [would] be credited at the rate of one-half year for each regular school year of employment," and that N.C. Gen. Stat. § 135-4(h) provides that, "when a member is on leave of absence and receiving less than his full compensation, he will be deemed to be in service only if he is contributing to the Retirement System as provided in [N.C. Gen. Stat. §] 135-8(b)(5)." As a result, the Retirement System argues that the trial court correctly concluded that "the overriding intent of the legislature [is] that one day of work equate to one day of retirement credit."

After carefully studying the record, the relevant statutory provisions, and the pertinent regulations, we conclude that the General Assembly did not contemplate awarding long-term disability benefits in situations like the one that confronts us in this case. As part of the process of reaching this determination, we believe that it is important to identify the issue which this Court has been called upon to resolve.

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

Petitioner has essentially assumed that, in the absence of some specific statutory provision or regulation prohibiting the arrangement adopted in the settlement agreement, the approach adopted in that document is lawful. Our dissenting colleague appears to concur in this approach. We are simply unable to agree that Petitioner has correctly identified the question that we are required to address. Since the ultimate issue is the proper definition of a statutory term, we believe, as we have already indicated, that the relevant question is whether, using traditional standards of statutory construction, "membership service" as that term is utilized in N.C. Gen. Stat. § 135-106(a) includes periods during which a "member" has leave without pay status. Thus, we believe that the Petitioner has used an incorrect standard in seeking reversal of the trial court's decision.

In construing relevant statutory provision, we believe that a number of factors tend to support the trial court's determination that "Petitioner did not have five years of membership service as a result of the July 2002 settlement agreement with the DHHS." First, as the Retirement System notes, the overriding theme of both the relevant statutory provisions and the *Wiebenson* decision of the Supreme Court is that, generally speaking, an employee gets a day's credit for a day's work.³ Although Petitioner is certainly correct in pointing out that neither N.C. Gen. Stat. § 135-4(b) nor N.C. Gen. Stat. § 135-4(h) have any direct application to the present case, they both clearly indicate that the General Assembly understood that "membership service" credit would generally be awarded on a day-for-day basis. Such thinking clearly underlies the *Wiebenson* decision, which adopts the Solomonic approach of dividing the amount of retirement credit available for the occupants of a shared position equally among the two occupants, implicitly suggesting that employees should get a day's credit for a day's work.⁴

3. Although our dissenting colleague contends that our "day's credit for a day's work" approach is inconsistent with existing Retirement System practice of granting employees a full month's credit for the first and last month in which an employee is employed, we note that the validity of that practice is not at issue in this case and that we express no opinion about the extent to which limited exceptions to the test outlined above may be appropriate. The approach advocated by Petitioner requires acceptance of a wholesale abandonment of the "day's credit for a day's work" approach we believe to be inherent in the relevant statutory provisions and in *Wiebenson*.

4. Petitioner cites *Wiebenson*, 345 N.C. at 738-39, 483 S.E.2d at 155, for the proposition that "[f]ull time employees who are on approved leave without pay are considered full time employees." In addition, Petitioner cites 25 N.C.A.C. 1D.0114, which provides, in pertinent part, that "[p]eriods of leave without pay do not constitute a break in service"). Based upon this authority, Petitioner argues that he does, in fact, have the necessary "membership service" to qualify for long-term disability benefits since he

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

Secondly, the day-for-day credit approach implicit in these statutory provisions and in the Supreme Court's decision in *Wiebenson* is also consistent with considerations of sound policy, in that it discourages attempts to manipulate the rules governing eligibility for long-term disability benefits and other benefits administered by the Retirement System in favor of a simple, easy to understand, intuitively obvious approach to the determination of the amount of "membership service" that a particular state employee has accumulated. According to a well-established principle of statutory construction, "courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results." *State v. Jones*, 359 N.C. 832, 838-39, 616 S.E.2d 496, 499 (2005) (quoting *Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978)). The effect of construing "membership service" to include leaves without pay will be to encourage more settlements of the type at issue here, an outcome which the Court should not facilitate given the uncertain effect of large numbers of such arrangements upon the economic status of the Retirement System.

Thirdly, we do not believe that the provisions of the settlement agreement are consistent with the relevant personnel rules governing the availability of short leave without pay. The "[v]arious types of leave recognized by the State Personnel Commission . . . [include] vacation leave, sick leave, worker's compensation leave, military leave, holidays, miscellaneous leave, voluntary shared leave, family and medical leave, community service leave, and leave without pay." 25 N.C.A.C. 1E.0102. The settlement agreement specifically provided that the days "for which [Petitioner] does not have sufficient sick or vacation leave will be equally apportioned to each month during this period and treated as leave without pay." Although "[l]eave without pay may be granted to a full-time or part-time permanent, trainee, or probationary employee for illness, educational purposes, vacation, or for any other reasons deemed justified by the agency head[.]" 25

was a full-time employee for sixty continuous months. The fact that an individual on leave does not have a break in service and remains a full-time employee does not, however, mean that the employee is entitled to "membership service" credit for periods when he or she does not actually work. In fact, as is discussed more fully in the text, the actual decision in *Wiebenson* contains a contrary suggestion, indicating that each of two full-time employees that shared a single position were entitled to half a year's retirement credit instead of a full year's credit. As a result, the absence of a "break in service" is not the same thing as continued "membership service" as defined in N.C. Gen. Stat. § 135-106(a).

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

N.C.A.C. 1E.1101, uncategorized unpaid leave appears to be divided into extended leave without pay, which is defined as “leave in excess of one-half the workdays in the pay period,” 25 N.C.A.C. 1E.1111, and short leave without pay, which is defined as “leave for less than one-half the workdays [in the] pay period.”⁵ 25 N.C.A.C. 1E.1112. A comparison of the number of workdays in the relevant months to the number of sick and vacation leave days exhausted in those months makes it clear that Petitioner exhausted sick and vacation leave for slightly more than half of the work days in each month from January 1, 2002, through September 6, 2002. As a result, under the applicable regulation, and as the trial court clearly found, Petitioner was on short leave without pay on those days that he was not exhausting sick or vacation leave. However, 25 N.C.A.C. 1E.1112 expressly provides that short leave without pay “is used to account for time that an employee is absent and has no accumulated or advanced leave credits.” Since Petitioner had unexhausted sick and vacation leave throughout the period from January 1, 2002, through September 6, 2002, he was not eligible under the express language of 25 N.C.A.C. 1E.1112 to receive short leave without pay.⁶ As a result, under the applicable State Personnel regulations, Petitioner was not entitled to receive a series of short leaves without pay. Thus, this inconsistency between the applicable State Personnel regulations and the provisions of the settlement agreement provides further confirmation that “membership service” for purposes of determining eligibility for long-term disability benefits does not include periods when an employee is on unpaid leave.

The parties spent considerable time in their briefs debating the impact of N.C. Gen. Stat. § 135-4(v) as it existed at the time that this controversy developed and 25 N.C.A.C. 1B.0436 on the proper resolu-

5. Petitioner and our dissenting colleague argue that 25 N.C.A.C. 1E.1101 allows for other types of leave without pay in addition to extended leave without pay and short leave without pay. However, such an interpretation is inconsistent with the structure of the relevant State Personnel regulations. In those regulations, 25 N.C.A.C. 1E.1101 is expressly labeled as a statement of policy, with extended leave without pay as defined in 25 N.C.A.C. 1E.1111 and short leave without pay as defined in 25 N.C.A.C. 1E.1112 covering all the applicable possibilities in terms of the length of leaves without pay. As a result, we do not believe that the State Personnel regulations treat 25 N.C.A.C. 1E.1101 as creating a third type of leave without pay separate and apart from extended leave without pay and short leave without pay.

6. Although Petitioner argues that 25 N.C.A.C. 1E.1112 does not expressly limit the availability of short leave without pay to situations where the employee lacks unexhausted sick or vacation leave, this argument ignores the plain language of the regulation. We are unable to understand how short leave without pay can be expressly made available for a particular purpose and yet be available in other instances.

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

tion of this case. After carefully studying the relevant version of N.C. Gen. Stat. § 135-4(v), we do not find that it provides much assistance in interpreting N.C. Gen. Stat. § 135-106(a). To that extent, we are unable to concur in the trial court's conclusion that this statutory provision "necessarily require[s]" that a reinstated employee who is exhausting leave do so "on a continuous basis." On the other hand, given the numerous other bases for construing "membership service" to exclude unpaid leave, we do not believe that our disagreement with the trial court's conclusion that N.C. Gen. Stat. § 135-4(v) requires continuous exhaustion of paid leave necessitates an award of appellate relief.

Finally, we agree with the trial court's conclusion that 25 N.C.A.C. 1B.0436 required the submission of the settlement agreement to the Office of State Personnel for approval, given that the "settlement agreement went considerably beyond merely allowing Petitioner to substitute his resignation for his dismissal and the withdrawal of the agreement." The simple fact of the matter is that DHHS was not entitled to provide Petitioner with binding assurances that the Retirement System would accept the approach adopted in the settlement agreement; the fact that the relevant DHHS officials were unaware of this requirement does not render the contract any less binding. Had Petitioner and DHHS taken the time to consult with the Office of State Personnel and the Retirement System prior to executing the settlement agreement, the present controversy could have been avoided.

Thus, for the reasons set forth above, we believe that the trial court correctly determined that only sick and vacation leave days could be counted toward the calculation of Petitioner's "membership service" and that the periods during which Petitioner was on leave without pay should be excluded from the calculation of Petitioner's "membership service." As a result, we affirm the trial court's conclusion that, under the applicable statutory provisions, Petitioner did not have sufficient membership service to be entitled to long-term disability benefits.

3. Retirement System Not Bound by DHHS Contract

[3] Even if he is not entitled to long-term disability benefits based on a proper application of the relevant statutory provisions and regulations, Petitioner contends that the settlement agreement represents a valid contract entered into between a state agency and an individual that is binding upon all agencies of state government, including the

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

Retirement System. As a result, Petitioner contends that he is entitled to enforce the settlement agreement against the Retirement System regardless of his eligibility for such benefits under a strict application of N.C. Gen. Stat. § 135-106(a).

Although there is no question that the State is bound by its contracts, it “is liable only upon contracts authorized by law.” *Smith v. State*, 289 N.C. 303, 322, 222 S.E.2d 412, 425 (1976) (emphasis added). Petitioner has not cited any authority in support of his implicit contention that the Secretary of DHHS is entitled to award membership service in the Retirement System, and we know of none. For that reason, the mere fact that Petitioner and DHHS entered into a contract that both parties hoped would render Petitioner eligible to receive long-term disability benefits does not automatically entitle him to receive such benefits. As a result, Petitioner is only eligible for long-term disability benefits to the extent that he qualifies for them under otherwise applicable law. Any other conclusion would allow state agencies to settle controversies with their employees or others without regard to their impact on other agencies or on state government at large. Our dissenting colleague does not seem to disagree with this fundamental proposition, since the argument advanced in the dissent with respect to this issue assumes that the settlement agreement operated to make Petitioner eligible for long-term disability benefits. Since we have already explained the reason that the arrangement set out in the settlement agreement did not render Petitioner eligible for long-term disability benefits, the status of the settlement agreement as an otherwise valid contract between Petitioner and DHHS does not change our view of the proper outcome of this case.⁷

4. Estoppel and Quasi-Estoppel

[4] Finally, Petitioner contends that the Retirement System is estopped from denying his claim for long-term disability benefits and that the trial court erred by concluding that “[n]either the elements of estoppel nor quasi-estoppel are present in this case.” We disagree.

[T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is

7. The dissent also notes that Petitioner gave up the right to contest his discharge in return for DHHS' willingness to enter in the settlement agreement. Although we recognize that Petitioner attempted to obtain certain benefits through the settlement agreement, we believe that any disability benefits made available through that mechanism have to be obtained in a manner that is consistent with existing laws governing eligibility for such benefits.

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted on by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change its position prejudicially.

Hawkins v. Finance Corp., 238 N.C. 174, 177-78, 77 S.E.2d 669, 672 (1953). The doctrine of quasi-estoppel differs from the doctrine of equitable estoppel in that the former "has its basis in the acceptance of benefits" and exists "where one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, . . . ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it." *Redevelopment Comm. v. Hannaford*, 29 N.C. App. 1, 4, 222 S.E.2d 752, 754 (1976). Although "a governmental agency is not subject to an estoppel to the same extent as a private individual or a private corporation[,]" " 'an estoppel may arise against a [governmental entity] out of a transaction in which it acted in a governmental capacity, if an estoppel is necessary to prevent loss to another, and if such estoppel will not impair the exercise of the governmental powers of the [entity].' " *Fike v. Bd. of Trustees*, 53 N.C. App. 78, 81-82, 279 S.E.2d 910, 913 (1981). According to Petitioner and our dissenting colleague, the fact that DHHS personnel responsible for implementing and ensuring compliance with Retirement System rules informed Petitioner and other DHHS officials that the proposed settlement agreement was in compliance with applicable Retirement System rules, *Fike*, 53 N.C. App. at 80-82, 279 S.E.2d at 912-13 (holding that the Retirement System was estopped from denying retirement benefits where plaintiff followed procedures established by the Retirement System in applying for disability retirement benefits and relied upon his retirement officer's assurances that he had done all that needed to be done in order to properly apply for the benefits in question), and the fact that the Retirement System accepted the contributions transmitted from DHHS on Petitioner's behalf, *Wiebenson v. Board of Trustees*, 123 N.C. App. 246, 250, 472 S.E.2d 592, 595 (1996), *modified and affirmed*, 345 N.C. 734, 483 S.E.2d 153 (1997)

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

(holding that the fact that the Retirement System accepted petitioner's contributions and provided "yearly statements . . . to petitioner for each year from 1985 through 1990 which indicated that she was continuing to accumulate retirement credit in the Retirement System" constituted a ratification of representations by an agency employee who purported to be the Retirement System's agent to the effect that the petitioner "was still a participating member of the Retirement System"), suffices to preclude the Retirement System from denying Petitioner's claim for long-term disability benefits.⁸

The trial court's findings of fact, which Petitioner has not challenged on appeal, do not provide any indication that anyone from DHHS contacted the Retirement System or obtained the Retirement System's approval prior to the date upon which the settlement agreement was executed. The failure of the parties to the settlement agreement to submit the settlement agreement for approval by the Office of State Personnel as required by 25 N.C.A.C. 1B.0436 or consult with the Retirement System precluded anyone from justifiably relying on the beliefs of the relevant DHHS officials that the approach adopted in that agreement would pass muster with the Retirement System. The unique nature of the settlement agreement coupled with the absence of any review by the Office of State Personnel or the Retirement System precluded anyone at DHHS from claiming to have any clear understanding of how that document would be treated by the Retirement System or from having any confidence that the settlement agreement was lawful. Although the Retirement System accepted payments made by DHHS on Petitioner's behalf, the trial court found that the Retirement System "had no knowledge of the real facts until well after the settlement agreement had been made." In addition, unlike the situation in *Wiebenson*, where the Retirement System accepted the employee's contributions and sent statements to the employee indicating that the employee was a participating member for a five year period, the Retirement System rejected Petitioner's

8. In addition, Petitioner contends that the administrative law judge erred by excluding testimony from his attorney that his attorney and Ms. Hollers, a DHHS employee, were involved in a three-way conversation with a Retirement System employee (whose name Petitioner's attorney could not recall) in which the unknown Retirement System employee assured Petitioner's attorney and Ms. Hollers that the arrangement embodied in the settlement agreement would work. However, the record does not reflect that Petitioner properly exhausted his administrative remedies with respect to this issue or assigned the administrative law judge's ruling as error. See, e.g., *State ex rel. Utilities Comm. v. Carolina Water Service, of North Carolina*, 335 N.C. 493, 498-500, 439 S.E.2d 127, 130-31 (1994); N.C.R. App. 10(a). As a result, Petitioner's challenge to the administrative law judge's ruling is not properly before us on appeal.

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

application for disability benefits during the course of evaluating his initial application. The record is totally devoid of any indication that the Retirement System made any misrepresentation to Petitioner or did anything whatsoever that would have suggested to Petitioner that the Retirement System would honor the arrangement embodied in the settlement agreement. Finally, unlike the situation at issue in *Fike*, there is no indication that Petitioner relied on anything that the Retirement System did or said in deciding to enter into the settlement agreement, and, unlike the situation in *Wiebenson*, there is no indication that the Retirement System acted consistently with Petitioner's expectations over a period of years so as to ratify the actions of the relevant DHHS officials. As a result, the trial court appropriately concluded that "[n]either the elements of estoppel nor quasi-estoppel are present in this case."

III. Conclusion

For the reasons stated above, we believe that the trial court correctly determined that Petitioner had not, despite the provisions of the settlement agreement, accumulated five years of membership service under and was not, for that reason, eligible for long-term disability benefits. In addition, we conclude that the trial court correctly rejected Petitioner's other challenges to the Board's decision and that its failure to address Petitioner's challenges to the Board's rejection of certain of the ALJ's findings of fact does not necessitate an award of appellate relief. As a result, we affirm the trial court's order upholding the Board's Final Decision denying Petitioner's request for such benefits.

Affirmed.

Judge BRYANT concurs.

Judge ROBERT C. HUNTER dissents in a separate opinion.

HUNTER, Robert C., Judge, dissenting.

Donald C. McCaskill ("petitioner") appeals the trial court's 23 February 2009 Order affirming the Final Decision of the Board of Trustees of the Teachers' and State Employees' Retirement System (the "Board of Trustees" or "respondent"), which determined that petitioner was not eligible for long-term disability benefits because he had not accumulated five years of membership service in the Teachers' and State Employees' Retirement System ("Re-

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

tirement System"). The Board of Trustees' decision accepted in part, rejected in part, and modified the Decision of the Administrative Law Judge ("ALJ"). The majority opinion of this Court affirms the trial court's order.

Due to my belief that the trial court erred and that the contract entered into between petitioner and the State of North Carolina was a lawful contract that in effect granted petitioner five years of membership service in the Retirement System, I respectfully dissent from the majority's holding. The trial court's order should be reversed and remanded with instructions for the trial court to remand this case to the Board of Trustees for modification of its Final Decision.

Analysis

I. Standard of Review

The trial court in this matter reviewed a Final Decision for the Board of Trustees in which the Board did not accept the recommendation of the ALJ.

In reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency does not adopt the administrative law judge's decision, the court shall review the official record, de novo, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record. The court reviewing a final decision under this subsection may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency for further explanations under G.S. 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the agency's failure to provide the explanations; and may take any other action allowed by law.

N.C. Gen. Stat. § 150B-51(c) (2009).

When this Court reviews appeals from superior court either affirming or reversing the decision of an administrative agency, our scope of review is twofold . . . : (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard.

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

Corbett v. N.C. Div. of Motor Vehicles, 190 N.C. App. 113, 118, 660 S.E.2d 233, 237 (2008). “Because the case before us involves a situation where the final agency decision rejected the decision of the ALJ, the appropriate standard of review for the trial court was *de novo*. The trial court stated the correct standard of review in its order. . . . We must now decide whether the trial court properly applied that standard of review.” *Granger v. University of North Carolina at Chapel Hill*, — N.C. App. —, —, 678 S.E.2d 715, 717 (2009) (internal citation omitted).

II. Requirements for Long-Term Disability Benefits

As a preliminary matter, N.C. Gen. Stat. § 135-106(a) (2009) sets out the requirements for receipt of long-term disability benefits as follows:

Upon the application of a beneficiary or participant or of his legal representative or any person deemed by the Board of Trustees to represent the participant or beneficiary, any beneficiary or participant who has had five or more years of *membership service* may receive long-term disability benefits from the Plan upon approval by the Board of Trustees

. . . .

As to the requirement of five years of *membership service*, any participant or beneficiary who does not have five years of membership service within the 96 calendar months prior to conclusion of the short-term disability period or cessation of salary continuation payments, whichever is later, shall not be eligible for long-term disability benefits.

(Emphasis added.) “‘Membership service’ shall mean service as a teacher or State employee rendered while a member of the Retirement System.” N.C. Gen. Stat. § 135-1(14) (2009). Accordingly, it is unquestioned that petitioner was required to render “membership service” for five years in order to qualify for long-term disability benefits.

Petitioner was granted leave without pay for portions of January 2002 through September 2002, interspersed with his accrued vacation and sick leave, so that he would be considered a full-time employee and reach his five years of membership service. It is undisputed that the Department of Health and Human Services (“DHHS”) authorized this leave in order to comply with the terms of the settlement agree-

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

ment. Respondent claims that petitioner did not have five years of membership service because he was not accruing membership service while on leave without pay. Conversely, petitioner argues that he was accruing membership service from January 2002 through September 2002 despite the fact that he was on leave without pay for a part of each month. I agree with petitioner and would hold that the contract at issue was lawful and binding between petitioner and the State of North Carolina.

III. Petitioner's Contract with DHHS

Petitioner argues that the trial court erred in concluding as a matter of law that:

Notwithstanding Petitioner's argument that he had a binding agreement with an agency of the State, the Retirement System was not a party to that agreement, nor was DHHS acting as the agent of the Retirement System. . . . Therefore, Petitioner is not entitled to enforce the terms of the agreement against the Retirement System.

I agree with petitioner and would hold that respondent is required to comply with the terms of the settlement agreement signed by petitioner and DHHS, which allowed petitioner to accumulate five years of membership service in the Retirement System by using his sick and vacation leave as well as leave without pay.

In this instance, petitioner had a binding contract with DHHS that provided him five years of membership service in the Retirement System through exhaustion of his leave and periods of leave without pay. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000) ("A compromise and settlement agreement terminating or purporting to terminate a controversy is a contract . . ."). The State of North Carolina is bound to fulfill the terms of a valid contract entered into by an agent of the State authorized by law to enter into such a contract. *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). Respondent does not contend that Secretary Odom was not authorized by law to enter into a contract with petitioner. In the notarized settlement agreement, Secretary Odom "warranted that she was vested with the authority to execute the foregoing document." DHHS has not breached this contract; however, respondent refuses to recognize the validity of the contract and claims that it violates North Carolina statutes and regulations. I disagree. Respondent has not pointed to any statutes or regulations that expressly prohibit the type of agreement at issue here. The majority acknowledges this

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

fact, but still holds that the contract is not binding on the Retirement System because “‘membership service’ for purposes of determining eligibility for long-term disability benefits does not include periods when an employee is on unpaid leave.” Accordingly, the majority holds that membership service is granted based on a “day-for-day credit approach.” I disagree with the majority’s position. I will address each of the statutes and regulations which respondent points to in support of its argument that the contract was unlawful. None of these arguments have merit.

First, as respondent points out, 25 N.C.A.C. § 1B.0436(a) states that “[a]ny settlement or consent agreement in a grievance or contested case which requires the processing of personnel action forms by the Office of State Personnel must be approved by the Office of State Personnel before such personnel action forms will be processed.” However, 25 N.C.A.C. § 1B.0436(a) goes on to say, “[t]his provision shall also not be construed to require approval of any settlement the terms of which allow an employee to substitute a resignation for a dismissal and to withdraw a grievance or a contested case action.” While the settlement agreement in this case went further than simply substituting a resignation for a dismissal, I still find that this provision is not applicable to the present situation. Petitioner did, in fact, substitute a resignation for a dismissal and withdrew his grievance against DHHS. Bill Guy, DHHS’ Human Resources Assistant Director and Employee Relations Manager, testified at the hearing that it was his understanding that 25 N.C.A.C. § 1B.0436(a) was not applicable for that very reason. Accordingly, I disagree with the majority’s position that the Office of State Personnel was required to approve the contract between petitioner and DHHS.

Respondent also cites N.C. Gen. Stat. § 135-4(v) (2009),⁹ which allows retroactive membership service to be granted to a member “who had service as an employee,” but whose service was “omitted from contributing membership through error.” Respondent contends that at the time the settlement agreement was signed, N.C. Gen. Stat. § 135-4 did not provide for retroactive membership service to an individual who was reinstated after wrongful termination, and, therefore, there was no means by which petitioner could be awarded retroactive

9. Effective 1 August 2003, after the settlement agreement at issue was signed, N.C. Gen. Stat. § 135-4 was amended and now provides for retroactive membership service for a member who is reinstated subsequent to an involuntary termination. N.C. Gen. Stat. § 135-4 (ff). While the amended statute would arguably apply to the facts of this case, it was not in effect at the time the contract at issue was executed.

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

membership service. Respondent's argument is without merit. N.C. Gen. Stat. § 135-4(v) does not prohibit a contractual remedy for an aggrieved employee who was omitted from membership service due to involuntary termination. Pursuant to the settlement agreement, petitioner was retroactively reinstated as a full-time employee. Petitioner never sought retroactive membership service under this statute. The majority and I are in agreement that this statute does not provide much assistance in interpreting the meaning of membership service.

Finally, respondent contends, and the majority agrees, that short term leave under 25 N.C.A.C. § 1E.1112(a) is meant to be used when an employee has no accumulated leave, and, therefore, petitioner was not allowed to take unpaid leave until he had exhausted his sick and vacation leave. 25 N.C.A.C. § 1E.1112(a) specifies the purpose behind short term leave without pay—"to account for time that an employee is absent and has no accumulated or advanced leave credits." However, an employee may be granted "Other Types of Leave Without Pay" "for any other reasons deemed justified by the agency head." 25 N.C.A.C. § 1E.1101.

In this case, Secretary Odom, in her discretion, granted leave without pay to petitioner under the terms of the settlement agreement. I disagree with the majority's assertion that there are only two types of leave without pay, short term leave and extended leave. 25 N.C.A.C. § 1E.1101 provides for leave for "any other reasons deemed justified by the agency head." The wording of this personnel rule clearly grants the agency head, in this case Secretary Odom, the discretion to grant leave in situations outside of those defined in 25 N.C.A.C. § 1E.1111 and 25 N.C.A.C. § 1E.1112. At the hearing, Marshall Barnes, Deputy Director of the Retirement System, was unable to cite any rules or regulations that would require an employee to exhaust his or her leave continuously before taking leave without pay. (T pp. 573-74). Barnes was unable to do so because none exists. Accordingly, it is my position that 25 N.C.A.C. § 1E.1101 may be used in situations such as this to grant an employee leave without pay, so long as it is approved in the discretion of the agency head.

Regardless of the form of leave taken, the majority concedes that pursuant to 25 N.C.A.C. § 1D.0114 "[p]eriods of leave without pay do not constitute a break in service," therefore, petitioner maintained full-time employee status while on leave. The material dispute between the majority and I is that the majority holds that membership service should *always* be calculated on a day-for-day basis, while I

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

believe that an employee should be granted membership service credit for the entire month in some circumstances, such as in the present case. At the hearing, Barnes testified that the practice of the Retirement System is to grant a full month's retirement credit in some situations, particularly for the first and last month of employment. This testimony does not support a day-for-day calculation method; rather, it supports the opposite position—that in some circumstances an employee who contributes to the Retirement System for part of a month is awarded a full month's credit of membership service. Clearly the Retirement System is not strictly following a day-for-day accounting system at this time. If the majority position is upheld, then the current policies of the Retirement System will be deemed unlawful, an untoward result that would require the Retirement System to prohibit the grant of membership service for the first and last month of employment where the employee did not work the entire month, or in those unique circumstances that Barnes alluded to in his testimony.¹⁰

As the majority notes, in *Wiebenson v. Bd. of Trustees, State Employees' Ret. Sys.*, 345 N.C. 734, 739, 483 S.E.2d 153, 155 (1997) (*Wiebenson II*), *aff'g as modified*, 123 N.C. App. 246, 250, 472 S.E.2d 592, 595 (1996) (*Wiebenson I*), our Supreme Court held that a state employee involved in a job sharing program did not have a break in service during the months she was on leave of absence. The majority points to the fact that Wiebenson was only granted .5 credits in the Retirement System for the six months she was actually working, despite the fact that she was a full-time employee while on leave. The Supreme Court did take note of that fact in the opinion, but the Court did not hold that membership service was calculated on a day-for-day basis. Furthermore, Wiebenson was on extended leave for six months of the year in which she was likely not contributing to the Retirement System.¹¹ Petitioner in this case was granted leave without pay pur-

10. Although the majority claims that it is not commenting upon the Retirement System's current practices, the effect of its holding will certainly alter the Retirement System's practices, particularly with regard to the first and last month of employment.

11. To be clear, I recognize that being a full-time employee does not mean that the individual is automatically accruing membership service in the Retirement System. Clearly, Wiebenson was a full-time employee while on leave for six months; however, she was only accruing membership service during the months she was working and contributing to the Retirement System. As stated *supra*, that fact distinguishes *Wiebenson* from the present case. Here, petitioner was contributing to the Retirement System during the months in which he took leave without pay. In other words, petitioner, unlike Wiebenson, was a full-time employee *and* contributing to the Retirement System at all times he was employed.

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

suant to 25 N.C.A.C. § 1E.1101 (he was not on extended leave) during which time he was contributing to the Retirement System.¹²

In sum, it is my position that petitioner did not have to exhaust his sick and vacation leave prior to taking leave without pay, and, contrary to the majority opinion, membership service is not always based on a day-for-day calculation method.¹³ Based on my interpretation of the applicable statutes and regulations, I see no prohibition against the settlement agreement entered into by DHHS with petitioner. This agreement reinstated petitioner so that he could achieve five years of membership service in the Retirement System. Additionally, respondent has not pointed to a statute or regulation that requires an employee to fully exhaust his or her leave prior to taking a leave of absence. Because no laws were violated, there was nothing illegal about this arrangement.

It is important to note that the language of the contract explicitly stated that the purpose was to reinstate petitioner “for the purpose of allowing him to use his accumulated sick and vacation leave hours to maintain his employment until he has attained five (5) years of contributing service in the Retirement System.” The agreement went on to state that petitioner’s sick or vacation leave would be equally apportioned to each month between January 2002 and September 2002 and the remaining days would be treated as leave without pay. There was no attempt to hide what petitioner bargained for and he received assurances from DHHS that the settlement agreement was in compliance with all statutes, rules, and regulations concerning retirement.

It is also important to recognize that, pursuant to this contract, petitioner relinquished his right to pursue his grievance against DHHS and that petitioner did not unilaterally propose this arrangement; rather, the State was involved in formulating the contract, which benefitted both the State and petitioner. Respondent is now attempting to invalidate a valid contract because it does not approve of the result.

Though there is no case law directly on point, it is my firm belief that when a party enters into a lawful contract with one agency of the State of North Carolina, all other agencies are bound to abide by its terms. Respondent may feel that petitioner circumvented the process

12. The State paid petitioner’s contribution retroactively.

13. I am not, as the majority seems to imply, advocating a wholesale abandonment of the day-for-day credit approach.

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

of achieving five years of membership service, but that does not change the fact that petitioner was assured that the settlement agreement was sound and there is, in fact, no statute, regulation, or case law prohibiting this type of arrangement. If the legislature wishes to enact a statute expressly forbidding a contract of this nature, then it is free to do so. Moreover, the State itself may prohibit these types of contracts from being entered into by a state agency. However, as the laws and regulations currently exist, there is no prohibition in place that would make this contract unlawful.¹⁴

Upon fulfilling the terms of the contract, petitioner had five years of membership service and was, therefore, vested in the Retirement System. *George v. George*, 115 N.C. App. 387, 389, 444 S.E.2d 449, 450 (1994) (A pension “vests” when “‘an employee has completed the minimum terms of employment necessary to be entitled to receive retirement pay at some point in the future.’”) (quoting *Milam v. Milam*, 92 N.C. App. 105, 107, 373 S.E.2d 459, 460 (1988), *disc. review denied*, 324 N.C. 247, 377 S.E.2d 755 (1989)), *cert. denied*, 342 N.C. 192, 463 S.E.2d 236 (1995).

IV. Collateral Estoppel

Assuming, *arguendo*, that the contract violated an applicable statute or regulation, petitioner also alleges that the trial court erred in holding as a matter of law that no form of estoppel applied to this case. I agree.

It is elementary that when one, with no authority whatever, or in excess of the limited authority given him, makes a contract as agent for another, or purporting to do so as such agent, the supposed principal, upon discovery of the facts, may ratify the contract, in which event it will be given the same effect as if the agent, or purported agent, had actually been authorized by the principal to make the contract prior to the making thereof.

Wiebenson I, 123 N.C. App. at 250, 472 S.E.2d at 595 (quoting *Patterson v. Lynch, Inc.*, 266 N.C. 489, 492, 146 S.E.2d 390, 393 (1966)).

The Supreme Court in *Wiebenson II* did not overturn this Court's holding in *Wiebenson I* where we held that the Retirement System

14. Clearly, a state agency may not act outside of the bounds of laws and regulations set up by our legislature or the State through its Administrative Code. For example, if one agency attempted to change the retirement benefits formula set forth by the State, then that action would not be acceptable. That is not the case here where DHHS acted in accord with state laws and regulations.

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

was estopped from denying Wiebenson her retirement benefits. This Court held:

Here, petitioner's supervising ARC director indicated to her in his memo that he had discussed the possibility of petitioner and Ms. Brank sharing one position with the Department of Human Resources and that DHR had approved the job-sharing option. Petitioner's director also explicitly stated to petitioner in his memo that petitioner would continue to be a participating member of the Retirement System. *We conclude that the ARC director, by his statements, purported to be the Retirement System's agent and that petitioner reasonably relied on his representations.* The record includes copies of yearly statements that the Retirement System provided to petitioner for each year from 1985 through 1990 which indicated that she was continuing to accumulate retirement credit in the Retirement System. We conclude that the Retirement System ratified the director's representations and statements to petitioner by continuing to accept her contributions to the Retirement System and by continuing to send petitioner yearly statements indicating that petitioner was still a participating member of the Retirement System. Accordingly, we also conclude that the Retirement System may not now assert that petitioner is not entitled to retirement credit for the years that she participated in the job-sharing program.

Id. at 250, 472 S.E.2d at 595 (emphasis added). *Wiebenson I* analogized the case, at least in part, to *Fike v. Bd. of Trustees*, 53 N.C. App. 78, 279 S.E.2d 910, *disc. review denied*, 304 N.C. 194, 285 S.E.2d 98 (1981). In *Fike*, the petitioner filed for retirement benefits on behalf of his ailing wife. *Id.* at 78, 279 S.E.2d at 911. Upon submitting the forms to Ruth Ellis, the Payroll and Benefits Manager employed by the University where his wife worked, petitioner believed that the forms would be filed and no further action was required on his part. *Id.* Petitioner then learned that Ellis had not filed the retirement disability forms with the Retirement System. *Id.* at 79, 279 S.E.2d at 911. Petitioner advised Ellis to file them, but by the time Ellis did so, the effective date was November 1978 and petitioner's wife died in October 1978. *Id.* at 79, 279 S.E.2d at 912. The Retirement System claimed that petitioner's wife was not retired at the time of her death and refused to grant petitioner her accrued benefits. *Id.* This Court held that even though the Retirement System did not have "sufficient control over Mrs. Ellis, or her employer, for her to be its actual agent" the Retirement System Handbook instructed prospective retirees to submit the forms to his or her personnel officer, in that case Ellis. *Id.*

McCASKILL v. DEP'T OF STATE TREASURER

[204 N.C. App. 373 (2010)]

at 81, 279 S.E.2d at 913. Petitioner complied with that process. *Id.* In *Wiebenson I*, we found that *Fike* was “arguably distinguishable” in that Wiebenson had not reviewed a handbook that directed her to rely on her director’s representations; nevertheless, the Court found that ratification applied in that case because Wiebenson relied on assurances from a person who claimed to be knowledgeable about the Retirement System’s rules and regulations. *Wiebenson I*, 123 N.C. App. at 250, 472 S.E.2d at 595.

Similarly, as seen in *Wiebenson I*, Guy, who informed petitioner that his retirement vesting was secure, was not a member of the Retirement System, but purported to be knowledgeable and made assurances to petitioner. “[B]y his statements, [Guy] purported to be the Retirement System’s agent and . . . petitioner reasonably relied on his representations.” *Id.* Additionally, as stated by the ALJ:

The preponderance of the evidence showed that Respondent accepted DHHS retirement benefit contributions on Petitioner’s behalf, and never returned those contributions to Petitioner. By accepting and never returning Petitioner’s retirement contributions, *Respondent ratified DHHS’ retirement contributions for Petitioner, and indicated that Petitioner was still a participating member of the Retirement System.*

Because petitioner relied on Guy’s assurances that the contract did not violate any rules or regulations of the Retirement System, and the Retirement System ratified Guy’s assertions by accepting the contributions from petitioner and not returning them, I would hold that respondent is now estopped from denying petitioner five years of membership service.¹⁵

I would also posit that the State as a whole is estopped from denying petitioner what he bargained for in the contract signed by DHHS, a State agency. The contract was lawful, clearly set out what petitioner bargained for, and yielded a benefit to the State (petitioner’s relinquishment of his right to pursue his action for wrongful termination). DHHS, the drafter of the contract, has never sought to have the contract declared unlawful and the Retirement System has no valid grounds for attempting to do so now.

15. The majority states that the Retirement System is not estopped because it never told petitioner that his contract was lawful. The majority ignores the fact that in *Wiebenson* and *Fike*, the purported assurances made to the petitioners were made by individuals not employed by the Retirement System. The Retirement System was estopped in those cases because it ratified the statements made to the petitioners, even where those persons were not officially agents of the Retirement System.

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

Conclusion

In this case, the State of North Carolina entered into a valid contract with petitioner which respondent now seeks to avoid. As stated *supra*, Secretary Odom had the authority to enter into this contract and she had the authority to grant petitioner leave without pay for a portion of each month. Petitioner obtained five years of membership service by contributing to the Retirement System for each month he was employed.

Due to my determination on these issues, I would not address petitioner's remaining assignments of error. Accordingly, under the unique facts of this case, I would reverse the order of the trial court and remand to the trial court with instructions to remand to the Board of Trustees to amend its Final Decision.

JERRY ALAN REESE, PLAINTIFF v. MECKLENBURG COUNTY, NORTH CAROLINA;
MECKLENBURG COUNTY PUBLIC FACILITIES CORPORATION; 300 SOUTH
CHURCH STREET, LLC; AND R.B.C. CORPORATION, DEFENDANTS

NO. COA09-499

(Filed 15 June 2010)

1. Pleadings— answers and counterclaims—motion to strike attachment—properly denied

The trial court did not err by denying plaintiff's motion to strike an exhibit attached to defendants' answers and counterclaims. The trial court did not abuse its discretion by concluding that the material contained in the attachment had some "possible bearing upon the litigation."

2. Pleadings— judgment on the pleadings—properly granted

The trial court did not err in entering judgment on the pleadings on plaintiff's first claim for relief, requesting a determination that a resolution authorizing defendant county's purchase of certain real property was invalid. Plaintiff's allegations were insufficient to establish the manifest abuse of discretion necessary to set aside defendant county's purchase of the real property.

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

3. Pleadings— judgment on the pleadings—properly granted

The trial court did not err in entering judgment on the pleadings on plaintiff's second claim for relief, seeking entry of an order nullifying a contract entered into by defendant county for the purchase of real property. Plaintiff's claim failed to allege a manifest abuse of discretion on the part of defendant county.

4. Pleadings— judgment on the pleadings—properly granted

The trial court did not err in entering judgment on the pleadings on plaintiff's fourth claim for relief, challenging the approval of financing for defendant county's purchase of certain real property. Plaintiff's allegations were merely conclusory and did not allege the facts necessary to establish a manifest abuse of discretion by defendant county.

5. Pleadings— judgment on the pleadings—properly granted

The trial court did not err in entering judgment on the pleadings on plaintiff's third claim for relief, seeking the nullification of an ordinance appropriating money to fund defendant county's acquisition of property for an urban park. As the trial court properly granted judgment on the pleadings in favor of defendants on plaintiff's first, second, and fourth claims, this claim failed as well.

6. Jurisdiction— subject matter—claim properly dismissed

The trial court did not err in dismissing plaintiff's amended claim for relief, which was predicated upon plaintiff's prediction that he would prevail in a related administrative litigation. Because the factual prerequisite for the maintenance of the claim had not yet occurred, the trial court did not have subject matter jurisdiction over the claim.

Appeal by plaintiff from orders entered on 14 May 2008, 9 June 2008, 15 September 2008, and 23 September 2008 by Judge W. David Lee in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 October 2009.

Jerry Alan Reese, pro se.

Womble, Carlyle, Sandridge, & Rice, PLLC, by James P. Cooney, III, and G. Michael Barnhill, for defendant-appellees, Mecklenburg County, Mecklenburg County Public Facilities Corporation, 300 South Church Street, LLC, & R.B.C. Corporation.

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

Robinson, Bradshaw & Hinson, P.A., by Ward McKeithen, for defendant-appellees Mecklenburg County and Mecklenburg County Public Facilities Corporation.

ERVIN, Judge.

This appeal involves a challenge to the conveyance of undeveloped real property located within the Second and Third Wards in the City of Charlotte by Plaintiff Jerry Alan Reese, a board-certified real estate attorney and real property developer.¹ The present case arises from a series of transactions entered into by the City of Charlotte, Mecklenburg County, and the Charlotte-Mecklenburg Board of Education for the purpose of consolidating jointly-held properties and constructing a minor-league baseball stadium,² an urban park, a new Education Headquarters, and other mixed-use developments that are intended to spur economic revitalization of the area. Plaintiff, who favors a competing development plan, has challenged a number of actions by the County and the Mecklenburg County Public Facilities Corporation in this case. After careful consideration of the record in light of the applicable law, we conclude that the challenged orders should be affirmed.

I. Factual Background

A. Substantive Facts

At the time Plaintiff filed his complaint, 300 South Church Street, LLC, owned two parcels of land situated within the Third Ward of the City of Charlotte, designated as (1) 316 South Church Street and (2) 316 South Poplar Street. Defendant R.B.C. Corporation owned five parcels of land located within the same area, designated as (1) 212/216 West Martin Luther King Jr. Boulevard; (2) 224 West Martin Luther King, Jr. Boulevard; (3) 301 South Mint Street; (4) 316 South Poplar Street; and (5) 322 South Church Street. These seven parcels of real property are contiguous and are referred to collectively in Plaintiff's complaint as the Assemblage.

In early December 2007, RBC and Spectrum Investment Services, Inc., entered into an agreement, known as the RBC Parcels Contract,

1. This Court has issued opinions in a number of related cases, including: *Reese v. Mecklenburg County*, — N.C. App. —, 676 S.E.2d 481 (2009) (*Reese I*), *Reese v. Mecklenburg County*, — N.C. App. —, 676 S.E.2d 493, *disc. review denied*, 363 N.C. 656, 685 S.E.2d 105 (2009) (*Reese II*), and *Reese v. Mecklenburg County*, — N.C. App. —, 685 S.E.2d 34 (2009) (*Reese III*).

2. The County plans to lease the stadium to Knights Baseball, Inc.

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

under which Spectrum agreed to purchase the five parcels owned by RBC. The County and 300 South Church Street negotiated an agreement, which is referred to in the complaint as the Assemblage Contract, under which the County would purchase the entire Assemblage from 300 South Church Street. The Assemblage Contract contemplated that, prior to closing, Spectrum would “assign to Defendant County its rights under the RBC Parcels Contract and Defendant County [would] assume the obligations of Spectrum under the RBC Parcels Contract.” On 15 January 2008, the County Commission adopted a resolution, which is referred to in Plaintiff’s complaint as the Assemblage Purchase Resolution, authorizing the purchase of the parcels owned by 300 South Church Street and RBC. On that same day, the County executed a joinder to the RBC Parcels Contract, under which “Spectrum assigned its rights to the County and the County assumed the obligations of Spectrum to RBC.” In addition, the County Commission also adopted a resolution authorizing the sale of certain publicly-owned property located in the Second Ward to Brooklyn Village, LLC, which is referred to in Plaintiff’s complaint as the Brooklyn Village Contract.

As part of the process of consummating this series of transactions, the County submitted an application seeking authorization to issue \$161,310,000 in certificates of participation (COPS) to the North Carolina Local Government Commission on or about 12 December 2007. In its application, the County asserted that approval of such funding was necessary in order “to continue to provide and enhance court, school, community college, library, infrastructure and park facilities.” On 18 December 2007, the County Commission adopted a resolution which included a “request[] [that] the Local Government Commission of North Carolina [] (LGC) approve such proposed installment financing contracts.”

On 2 January 2008, Plaintiff provided the LGC with written notification that he opposed the proposed COPS financing and requested a hearing at “which Plaintiff and all other interested parties could be heard.” On 8 January 2008, the LGC’s Executive Committee approved the County Commission’s application. Immediately after receiving official notice of the LGC’s action, Plaintiff filed a notice of appeal and a request for *de novo* review by the full LGC. The LGC denied Plaintiff’s request for *de novo* review on 25 January 2008. On 4 February 2008, Plaintiff filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings seeking review of the LGC’s decision. On 14 and 21 February 2008, the County and the

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

Financing Corporation sold approximately \$161,000,000 in COPS. On 25 July 2008, the Honorable Fred Morrison, Senior Administrative Law Judge with the Office of Administrative Hearings, issued a Decision Granting Summary Judgment for Petitioner which reversed the LGC's decision and ordered it to provide Plaintiff with a *de novo* review of the County's application for approval of the COPS financing by the full LGC. In accordance with the relevant provisions of the Administrative Procedures Act, the matter was referred to the LGC for the making of a final decision.

B. Procedural History

On 2 January 2008, Plaintiff filed a motion seeking the issuance of a summons and an extension of time to file a complaint and a notice of *lis pendens* applicable to tracts of real property owned by RBC and 300 South Church Street. On the same date, the office of the Clerk of Superior Court of Mecklenburg County granted Plaintiff's motion. On 22 January 2008, Plaintiff filed a verified complaint in which he which asserted the following five claims for relief, which we summarize as follows:

1. The purchase price that the County had agreed to pay under the Assemblage Purchase Resolution and the related Assemblage Contract exceeded the actual value of the Assemblage by approximately 27%, or \$4,024,988, as evidenced by the price paid to the County by the North Carolina Department of Transportation for a nearby tract of property "and the determination of the Mecklenburg County Real Estate Services Department," so that "the purchase price approved by the Assemblage Purchase Resolution has no relation to the true fair market value of the Assemblage, but is rather a contrived amount designed solely to accomplish a *de facto* swap of the Assemblage for the properties to be acquired by Brooklyn Village, LLC from the County pursuant to the Brooklyn Village Contract, so that the Assemblage Purchase Resolution should be nullified and set aside "on the grounds that the inflated purchase price is excessive and constitutes a manifest abuse of discretion by Defendant County and its Board."

2. The County already owns a 7.8 acre tract of land adjacent to the Assemblage which was acquired for use as a public park that has a fair market value of approximately \$30,000,000 and which remains suitable for use as a public park, so that the execution of the Assemblage Contract should be nullified and set aside "on the grounds that the purchase which is the subject of such contract is

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

redundant, unnecessary and a material waste of \$19,000,000 in public funds critically needed for other public purposes, and a manifest abuse of discretion by Defendant County and the Board.”

3. The County adopted a Park Land Acquisition Capital Project Ordinance that appropriated \$19,000,000 for the purpose of funding the acquisition of the Assemblage in accordance with the Assemblage Contract, with the funding to be used in reimbursing the appropriations to be utilized to purchase the property in question to come from installment financing to be completed during 2008, so that the Park Land Acquisition Capital Project Ordinance should be nullified and set aside “[s]ince the transaction underlying [that ordinance] is unlawful and since the source of reimbursement is also unlawful.”

4. The application and supporting materials submitted to the LGC by the County in support of its application for approval of COPS financing are deficient in a number of respects, so that the COPS Financing Resolution “is unlawful, invalid and a manifest abuse of discretion by the Board of Defendant County” and should “be declared unlawful and set aside.”

5. Since N.C. Gen. Stat. § 159-149 prohibits the consummation of COPS financing without final and unappealable approval from the LGC and since such approval had not been received due to Plaintiff’s request for review of the County’s application, the County and Defendant Mecklenburg County Public Facilities Corporation should be preliminarily enjoined from consummating the proposed COPS financing.

On 19 March 2008, the County and the Facilities Corporation filed a joint answer and counterclaims and 300 South Church Street and RBC filed separate answers and counterclaims. In addition, Defendants filed a joint motion seeking the entry of an order striking Plaintiff’s notice of *lis pendens* and judgment on the pleadings. On 21 April 2008, Plaintiff filed a motion seeking the entry of an order striking portions of the answers filed by all of the Defendants on the grounds that they contained “irrelevant, immaterial, impertinent and scandalous material in violation of Rule 12(f) of the Rules of Civil Procedure.” On the same date, Plaintiff filed a motion seeking to have Defendants’ motion for judgment on the pleadings converted to a motion for summary judgment on the grounds that Defendants’ motion constituted an effort to obtain, “in essence, summary judgment without Plaintiff’s ability to conduct discovery and impeach evidence.”

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

On 14 May 2008, the trial court entered an order striking Plaintiff's notice of *lis pendens*, *nunc pro tunc*. On 20 May 2008, Plaintiff noted an appeal to this Court from the trial court's order striking the notice of *lis pendens* and filed a motion requesting a stay of the proceedings until his interlocutory appeal from the trial court's order striking his notice of *lis pendens* and an administrative proceeding in which he had challenged the LGC's approval of the County's request for authorization to use COPS financing had been resolved. On 23 May 2008, Defendants filed a response to Plaintiff's request for a stay and Plaintiff filed replies to Defendants' counterclaims.

On 29 May 2008, a hearing on various motions was held before the trial court. On 5 June 2008, the trial court entered orders denying Plaintiff's stay motion, granting in part and denying in part Plaintiff's motion to strike various items from Defendants' answers and counterclaims, and requiring Defendants to refile their answers and counterclaims in such a manner as to omit the stricken materials. On 11 June 2008, Plaintiff noted an appeal to this Court from the trial court's orders denying his request for a stay and granting in part and denying in part his motion to strike. Although Plaintiff sought the issuance of a temporary stay and a writ of supersedeas in the hopes of staying further proceedings at the trial level pending appeal, his efforts to obtain such relief from this Court were unsuccessful.

On 16 June 2008, Defendants filed amended answers and counterclaims in accordance with the trial court's 9 June 2008 order. On 23 June 2008, Plaintiff filed a motion to strike certain portions of the amended answers and counterclaims filed by Defendants. On 30 June 2008, Plaintiff filed replies to Defendants' amended counterclaims. On 25 July 2008, Plaintiff filed a motion seeking the entry of an order allowing him to amend his complaint for the purpose of restating his fifth claim for relief so as to allege that, based on Judge Morrison's decision granting summary judgment in his favor, the LGC's decision approving the County's application for authorization to issue COPS was "fatally flawed and void" and that "Plaintiff is entitled to a permanent injunction barring" payments under the COPS financing contracts. On 31 July 2008, Defendants filed a response in opposition to Plaintiff's amendment motion. On 21 August 2008, Plaintiff amended his amendment motion by attaching a revised version of his amended fifth claim for relief which set out in more detail the proceedings which Plaintiff anticipated would occur before the

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

LGC in the aftermath of Judge Morrison's decision. On 29 August 2008, Defendants filed answers to the proposed amendment to Plaintiff's complaint.

At the 29 August 2008 hearing, the trial court refused to reconsider its decision to deny Plaintiff's motion to strike Exhibit Nos. 7 and 9(a) to the answer and counterclaims filed by the County and the Facilities Corporation. After making this determination, the trial court heard argument from the parties concerning pending motions. That same day, the trial court granted Plaintiff's motion to amend his complaint. That same date, the trial court entered an order granting Defendants' motion for judgment on the pleadings with respect to the first four claims for relief asserted in Plaintiff's complaint and dismissing the fifth claim for relief asserted in Plaintiff's complaint for lack of subject matter jurisdiction. On 23 September 2008, the trial court entered an order denying Plaintiff's motion to convert Defendants' motion for judgment on the pleadings into a motion for summary judgment and an order denying Plaintiff's motion for preliminary injunction.

On 10 October 2008, Plaintiff gave notice of appeal to this Court from the trial court's 15 September 2008 order granting Defendant's motion for judgment on the pleadings with respect to the first four claims for relief asserted in Plaintiff's complaint and dismissing the fifth claim for relief asserted in Plaintiff's complaint for lack of subject matter jurisdiction, the trial court's 23 September 2008 order denying Plaintiff's motion to convert Defendants' motion for judgment on the pleadings to a motion for summary judgment, and the trial court's 23 September 2008 order denying Plaintiff's motion for a preliminary injunction. On 26 September 2008 and 20 October 2008, respectively, Defendants requested this Court to dismiss Plaintiff's appeals from the trial court's orders striking his notice of *lis pendens* and denying his stay motion on the grounds that the orders in question were unappealable interlocutory orders. On 27 October 2008 and 18 November 2008, this Court granted Defendant's dismissal motions. On 7 January 2009, the trial court, with the consent of all parties, entered an order finding that the orders that it entered on 15 September 2008 and 23 September 2008 constituted final judgments with respect to all claims asserted by Plaintiff; that "the Counterclaims of each of the Defendants have not yet been resolved and remain pending;" that there was "no just reason to delay Plaintiff's appeal[s] from" the 15 September 2008 and 23 September 2008 orders; and that the 15 September 2008 and 23 September 2008 orders were

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

“subject to immediate appeal pursuant to” N.C. Gen. Stat. § 1A-1, Rule 54(b).³

II. Legal Analysis

A. Motion to Strike

[1] On appeal, Plaintiff challenges the trial court’s denial of his motions to strike Exhibit No. 7 attached to the answers and counter-claims filed by the County and the Facilities Corporation. Exhibit No. 7 consists of documents relating to the sale of a tract of property in the vicinity of the Assemblage by the County to the North Carolina Department of Transportation. In challenging the trial court’s ruling, Plaintiff argues that, since the “[p]arties are not permitted to ‘prove their case’ at the pleading stage by attaching evidentiary materials to their pleadings . . . prior to discovery, impeachment and rebuttal,” the trial court erred by refusing to strike Exhibit No. 7. We do not find Plaintiff’s contention persuasive.

Rule 12(f) of the North Carolina Rules of Civil Procedure, allows the court to strike from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter. *Carpenter*, 189 N.C. App. at 759, 659 S.E.2d at 765 (quoting N.C.R. Civ. P. 12(f) (2005)).

Rule 12(f) motions are addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of discretion. *Id.* (citation and internal quotations omitted). Matter should not be stricken unless it has no possible bearing upon the litigation. If there is any question as to whether an issue may arise, the motion [to strike] should be denied. *Id.*, 659 S.E.2d at 766 (quoting *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 316, 248 S.E.2d 103, 108, *disc. review denied*, 295 N.C. 735, 249 S.E.2d 804 (1978)).

Reese I, — N.C. App. at —, 676 S.E.2d at 492. (internal quotations omitted). As a result, the issue before the Court in connection with Plaintiff’s challenge to the denial of his motion to strike Exhibit No. 7 is whether the trial court abused its discretion by concluding that the material in question had some “possible bearing upon the litigation.”

3. Although the trial court’s 15 September 2008 order granting judgment on the pleadings in favor of Defendants with respect to the first four claims for relief set forth in Plaintiff’s complaint and dismissing the fifth claim for relief set forth in Plaintiff’s complaint for lack of subject matter jurisdiction are clearly final judgments with respect to Plaintiff’s claims, the same cannot be said with respect to the other orders referenced in the trial court’s certification order.

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

According to the allegations of Plaintiff's complaint:

25. On November 7, 2007, the Board authorized the sale of a parcel of land owned by Defendant County and located in close proximity to the Assemblage to the North Carolina Department of Transportation (the "NCDOT Parcel") for a purchase price of \$1,650,000, or, upon information and belief, approximately \$78.45 per square foot.

26. According to the November 7, 2007, resolution of the Board authorizing the sale, the sales price of \$1,650,000 (\$78.45 per square foot) for the NCDOT parcel was deemed to be "full and fair consideration for the parcel as determined by the Mecklenburg County Real Estate Services Department.

27. Upon information and belief, the NCDOT parcel is located near the Assemblage and is similarly situated in terms of location, access and other valuation factors.

28. Based on the sales price of the NCDOT parcel and the determination of the Mecklenburg County Real Estate Services Department, "full and fair consideration" for the Assemblage should be approximately \$78.45 per square foot.

Based upon these allegations, Plaintiff further alleged that "Defendant County, pursuant to the Assemblage Purchase Resolution and related Assemblage Contract, has agreed to pay a purchase price equal to approximately 27% (or \$4,024,988) more than the actual value of the Assemblage as established by the County's sale of the NCDOT parcel" and that, "[u]pon information and belief, the purchase price approved by the Assemblage Purchase Resolution has no relation to the true fair market value of the Assemblage but is rather a contrived amount designed solely to accomplish a *de facto* 'swap' of the Assemblage for the properties to be acquired by Brooklyn Village, LLC from the County pursuant to the Brooklyn Village Contract." As a result, the first claim for relief alleged in Plaintiff's complaint hinges on the assumption that the County should have paid the same purchase price for the Assemblage that it paid for the NCDOT parcel and that its failure to do so indicated that the County acted unlawfully when it purchased the Assemblage.

In responding to the first claim for relief asserted in Plaintiff's complaint, the County and Facilities Corporation attached the proposed action item considered by the County Commission and the signed resolution authorizing the sale of the NCDOT parcel from the

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

County to the NCDOT as Exhibit No. 7 to their answer and counterclaims. According to the materials contained in Exhibit No. 7, while certain County-owned land had been sold to the NCDOT at \$78.45 per square foot, the remainder of the property in question had been valued at \$95.00 per square foot, resulting in a 5% differential rather than the 27% differential cited in Plaintiff's complaint.

Plaintiff's challenge to the trial court's refusal to strike Exhibit No. 7 is predicated on his contention that, since he only referred to the \$1,650,000 aggregate and \$78.50 per square foot purchase price in his complaint, the additional information contained in Exhibit No. 7 concerning property retained by the County was not responsive to the allegations of his complaint and was, for that reason, irrelevant. Contrary to Plaintiff's argument, however, he specifically referenced the County Commission's decision to sell the parcel to NCDOT. As part of that process, he specifically mentioned the 7 November 2007 resolution authorizing that action in his complaint. Having included those allegations in his complaint, we believe that the County and the Facilities Corporation were entitled to attach the documentation evincing the County's approval of that transaction to their answer and counterclaims. Given the allegations of Plaintiff's complaint, the decisions on which he relies, such as *George Shinn Sports, Inc., v. Bahakel Sports, Inc.*, 99 N.C. App. 481, 393 S.E.2d 580 (1990), *disc. review denied*, 328 N.C. 571, 403 S.E.2d 511 (1991), and *Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 652 S.E.2d 701 (2007), are inapposite. Instead, as Defendants suggest, the proper resolution of the present issue is controlled by our prior decision in *Reese II*, in which we held that Plaintiff's decision to reference a particular agreement in his complaint allowed Defendants to append the attachments to that agreement to their answer on the grounds that it would be "disingenuous for plaintiff to argue that since he did not specifically refer to every attachment in his complaint that they were not properly before the trial court upon defendant's Rule 12(c) motion." *Reese II*, — N.C. App. at —, 676 S.E.2d at 496. As a result, we conclude that the trial court did not abuse its discretion by denying Plaintiff's motion to strike Exhibit No. 7.

B. Judgment on the Pleadings

Next, we address Plaintiff's challenge to the trial court's decision to enter judgment on the pleadings with respect to the first, second, third, and fourth claims for relief asserted in his complaint and to dismiss the fifth claim for relief asserted in his complaint for lack of jurisdiction. A careful review of the pleadings in light of the applica-

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

ble law indicates that the trial court's rulings with respect to these issues should be affirmed.

Judgment on the pleadings is "appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain. Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party." *Shehan v. Gaston Cty.*, 190 N.C. App. 803, 806, 661 S.E.2d 300, 303 (2008) (citing *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 765 (2008)). In deciding a motion for judgment on the pleadings, the trial court looks solely to the pleadings, *Wilson v. Development Co.*, 276 N.C. 198, 206, 171 S.E.2d 873, 878 (1970), and may only consider facts that have been properly pled and documents attached to or referred to in the pleadings. *See Wilson*, 276 N.C. at 206, 171 S.E.2d at 878-79 (citations omitted). "[W]here a source document, attached as an exhibit, is referred to by the pleadings, and its terms are inconsistent with the language of the pleading[s], the terms of the source document control." *Reese I*, — N.C. App. at —, 676 S.E.2d at 489. This Court reviews a trial court's order granting a motion for judgment on the pleadings on a *de novo* basis. *Carpenter*, 189 N.C. App. at 757, 659 S.E.2d at 764. We will now examine the trial court's order in light of these basic legal principles.

1. First Claim for Relief

[2] In his first claim for relief, Plaintiff sought a determination that the resolution authorizing the purchase of property from 300 South Church Street and RBC was invalid on the grounds that "Defendant County . . . ha[d] agreed to pay a purchase price equal to approximately 27% (\$4,024,988) more than the actual value of the Assemblage;" that "the purchase price approved by the Assemblage Purchase Resolution has no relation to the true fair market value of the Assemblage[,] but is rather a contrived amount designed solely to accomplish a *de facto* 'swap' of the Assemblage for the properties to be acquired by Brooklyn Village, LLC from the County pursuant to the Brooklyn Village Contract;" and that the Assemblage Purchase Resolution should be declared unlawful, nullified, and set aside "on the grounds that the inflated purchase price is excessive and constitutes a manifest abuse of discretion by Defendant County and its Board." In its order granting judgment on the pleadings in favor of Defendants with respect to this claim for relief, the trial court held that, "[a]s a matter of law, and standing alone, a 27% differential in

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

price in relation to another isolated transaction is not so excessive as to demonstrate the manifest abuse of discretion necessary to set aside a decision of a governmental body;" that "the Complaint is devoid of any allegation of corruption or self-dealing, payments to an insider or someone associated with the Board, or any other allegation that the price differential was the result of corruption or a manifest disregard of the Board's public duty;" that, according to Exhibit No. 7 attached to the amended answer and counterclaims filed by the County and Facilities Corporation, "the land referred to by the Plaintiff was the sale of only a *portion* of the subject parcel;" that "the entire parcel was estimated to have an appraised value of \$95 per square foot;" that "the price differential for the [Assemblage] is approximately 5% higher than land owned by the County as appraised at an earlier time;" and that "the formal pleadings reveal that, as a matter of law, the Board was within its discretion in accepting the purchase price set forth in the resolutions, and, in light of the uncontradicted facts appearing on the face of the pleadings, there are no allegations sufficient to establish the manifest abuse of discretion necessary to set aside the action of a public body." Although Plaintiff contends that the trial court utilized an incorrect "corruption and self-dealing" standard in reviewing the actions of the relevant local officials instead of determining whether they acted "(1) arbitrarily or capriciously or in bad faith, or (2) in disregard of the law" and argues that "[a] lack of due diligence in the acquisition of public property is evidence of arbitrary and capricious action," we conclude that the trial court did not err in granting judgment on the pleadings in favor of Defendants with respect to Plaintiff's first claim for relief.

North Carolina law recognizes a strong presumption that governmental bodies act in good faith. *Painter v. Wake County Board of Education*, 288 N.C. 165, 178, 217 S.E.2d 650, 658 (1975). "The courts may not interfere with the exercise of the discretionary powers of local administrative boards for the public welfare 'unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion.'" *Mullen v. Town of Louisburg*, 225 N.C. 53, 60, 33 S.E.2d 484, 489 (1945). A "manifest abuse of discretion" must be "so clearly unreasonable as to amount to an oppress[ion]," *James v. Nash Cty. General Hospital*, 1 N.C. App. 33, 34-35, 159 S.E.2d 252, 253 (1968) (quoting *Mullen*, 225 N.C. at 60, 33 S.E.2d at 489 (1945)); or amount to action "in wanton disregard of the public good." *Barbour v. Carteret County*, 255 N.C. 171, 181, 120 S.E.2d 448, 451 (1961). If a party contends that public officials have failed to act in good faith, then that party has the burden of overcoming the pre-

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

sumption by competent and substantial evidence. *Painter*, 288 N.C. at 178, 217 S.E.2d at 658. The statement of a claim for relief set forth in a party's pleading must "satisfy the requirements of the substantive law which gives rise to the pleading[]." *Alamance Cty. v. N.C. Dept. of Human Resources*, 58 N.C. App. 748, 750, 294 S.E.2d 377, 378 (1982) (citations omitted). "A 'mere assertion of a grievance' against a governmental entity is insufficient to state a claim for relief." *Reese I*, — N.C. App. at —, 676 S.E.2d at 489 (quoting *Alamance Cty.*, 58 N.C. App. at 750, 294 S.E.2d 378).

A review of the trial court's order reveals that its reference to "allegation[s] of corruption or self-dealing" was merely an example of the type of "palpable abuse of power" that could give rise to a conclusion that public officials "acted to enrich themselves" or acted in "wanton disregard of the public good." *See Reese II*, — N.C. App. at —, 676 S.E.2d at 498. In concluding that Defendants were entitled to judgment on the pleadings with respect to the first claim for relief asserted in Plaintiff's complaint, the trial court clearly stated that Plaintiff had failed to set forth "allegations sufficient to establish the manifest abuse of discretion necessary to set aside the action of a public body." As a result, the trial court applied the correct legal standard in ruling on Defendants' motion for judgment on the pleadings. *Alamance Cty.*, 58 N.C. App. at 749, 294 S.E.2d at 378 (stating that the courts have no authority to intervene in discretionary actions by governmental bodies "in the absence of fraud, manifest abuse of discretion or conduct in excess of lawful authority").

Furthermore, we agree with the trial court that Plaintiff failed to allege facts "sufficient to establish the manifest abuse of discretion necessary to set aside the action of a public body" in his first claim for relief. In seeking to persuade us to reach a contrary result, Plaintiff relies on the Supreme Court's decision in *Barbour*.⁴ In *Barbour*, the Carteret County Commission agreed to purchase a certain tract of property for \$75,000 without "having said property appraised and its value determined." The purchase price was alleged to be more than twice the property's value. *Barbour*, 255 N.C. at 182, 120 S.E.2d at 451. On appeal, the Supreme Court reversed the trial court's decision to dismiss a challenge to the County Commission's decision on the grounds that "[s]uch conduct [did] not comport with

4. Although Plaintiff also cites *Bowles v. Fayetteville Graded Schools*, 211 N.C. 36, 188 S.E. 615 (1936), for the proposition that courts should intervene where there is "allegation and proof that [a local board of education] failed to follow proper procedures in the sale of school property to a private party," Plaintiff has not alleged any failure on the part of the County to follow proper procedures in his first claim for relief.

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

the duty which public officials owe those they represent” and that the commissioner’s actions manifested bad faith. *Id.* at 182, 120 S.E.2d at 452. In this case, unlike *Barbour*, the County had the property appraised prior to deciding to purchase it and acted in compliance with established guidelines for obtaining approval of the necessary financing. In addition, the only support provided in Plaintiff’s complaint for his contention that the price paid for the Assemblage was too high related to the sale of the NCDOT parcel. Although the parties disagreed about whether the amount paid for the Assemblage was 5% or 27% higher than the price paid for the NCDOT parcel, we agree with the trial court that neither differential, standing alone, is sufficient to support a determination that the County Commission manifestly abused its discretion in deciding to purchase the Assemblage at the stated price. As a result, unlike the situation in *Barbour*, Plaintiff’s “excessive price” allegations do not suffice to save his first claim for relief from dismissal.

Finally, Plaintiff alleges that the purchase price was a “contrived amount designed to solely accomplish a *de facto* ‘swap’ of the Assemblage for properties to be acquired by Brooklyn Village, LLC from the County pursuant to the Brooklyn Village Contract.” Once again, such an allegation does not suffice to state a valid claim for relief. Simply put, Plaintiff has provided no factual support for its “contrived amount” allegation; in the absence of such supportive allegations, this portion of the first cause of action set out in Plaintiff’s complaint is insufficient to salvage Plaintiff’s claim in light of the strong presumption of lawfulness that attaches to the actions of public bodies. Thus, for all of these reasons, we conclude that the trial court did not err by granting judgment on the pleadings in favor of Defendants with respect to the first claim for relief set out in Plaintiff’s complaint.

2. Second Claim for Relief

[3] In his second claim for relief, Plaintiff alleges that “the Assemblage is being acquired . . . for use as a public park;” that Defendant County already owns a 7.8 acre tract of land . . . across Mint Street from the Assemblage which was acquired by Defendant County . . . for use as a public park;” that “the Existing Park Site is suitable in every way for development as a permanent public park;” that, “should Defendant County proceed with the development of the Existing Park Site as a public park, the purchase of the Assemblage would be unnecessary and the expenditure of approximately \$19,000,000 in County funds could be avoided;” and that “Defendant

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

County could develop [the Existing Park Site] as a public park without the borrowing and/or expenditure of additional public funds beyond the proceeds of the 2004 park bonds already allocated and set aside for such use.” Based on these allegations, Plaintiff sought the entry of an order nullifying, setting aside, and enjoining the Assemblage Contract “on the grounds that the purchase which is the subject of such contract is redundant, unnecessary and a material waste of \$19,000,000 in public funds critically needed for other public purposes, and a manifest abuse of discretion by Defendant County and the Board.” In granting Defendants’ motion for judgment on the pleadings directed toward this claim for relief, the trial court noted that “[t]he acquisition of [the Assemblage] is part of an overall plan for the development of the Center City of Charlotte adopted by the County and the City for the purposes of economic development, urban revitalization, community development and land use planning;” that “[t]he Board acted within its discretion and judgment in the development, location, and placement of public parks and recreation facilities in finding that [the Assemblage] was more suitable for an urban park;” that “[t]he Plaintiff’s allegation that the acquisition of [the Assemblage] is ‘unnecessary’ does not establish a manifest abuse of discretion;” and that “the formal pleadings, when viewed in their entirety, reveal that, as a matter of law, the Board was within its discretion in determining that [the Assemblage] was suitable for a public park and in choosing to dispose of other property which it owned . . . through the lease arrangement with Knights Baseball, all pursuant to an adopted plan for economic development, urban revitalization, community development and land use” so that “there are no allegations in light of the uncontradicted facts of the pleadings that establish the type of manifest abuse of discretion necessary to set aside the action of the public body.” On appeal, Plaintiff argues that the trial court erred by granting judgment on the pleadings with respect to his second claim for relief since “[a]llegations of wrongful borrowing and/or appropriation of public funds [are] sufficient to withstand a motion for judgment on the pleadings as such action may exhibit either unlawful or arbitrary and capricious conduct.” Once again, we conclude that Plaintiff’s argument lacks merit.

The only support that Plaintiff provides in support of his contention that an allegation that “wrongful borrowing and/or appropriation of public funds is sufficient to withstand a motion for judgments on the pleadings” is a citation to the Supreme Court’s decision in *Goldston v. State*, 361 N.C. 26, 637 S.E.2d 876 (2006), *disc. review denied and appeal dismissed*, 363 N.C. 802, — S.E.2d — (2010).

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

Goldston differs from this case in that the *Goldston* plaintiffs alleged a misuse of public funds in violation of state statute. In this case, Plaintiff is challenging the wisdom of the County's decision to purchase new land for use as a public park rather than using an existing park site for that purpose. In the absence of any factual allegations over and above the contention that the purchase of the Assemblage for use as a public park was "redundant, unnecessary, and a material waste of \$19,000,000," the second claim for relief set out in Plaintiff's complaint simply fails to allege a manifest abuse of discretion on the part of the County. *Alamance County*, 58 N.C. App. at 750, 294 S.E.2d at 378. As a result, the trial court correctly granted judgment on the pleadings in favor of Defendants on Plaintiff's second claim for relief.

3. Fourth Claim for Relief

[4] In his fourth claim for relief, Plaintiff challenged the approval of the Resolution Authorizing and Approving an Installment Financing (COPS Financing Resolution) on 18 December 2007. According to the allegations of Plaintiff's fourth claim for relief, the project to be funded by the COPS Financing Resolution was the property to be purchased pursuant to the Assemblage Purchase Resolution.⁵ Although Plaintiff alleged that the County Commission found that the proposed COPS Financing was " 'necessary and expedient' " for the County, "was preferable to bond issues . . . for the same purpose," that "[t]he sums estimated to fall due under the financing contracts underlying the COPS Financing were adequate and not excessive for the proposed purpose," and that "[a]ny increase in taxes to pay the obligation would not be 'excessive,' " he contended that these determinations were "erroneous and not supported by competent facts and evidence known to the Board at the time of the adoption" of the resolution. Among other things, Plaintiff alleged that the County already owned land in the vicinity of the Assemblage available for use as a public park, rendering the borrowing of an additional \$19,000,000 for the purchase of park land neither "necessary nor expedient." Similarly, Plaintiff alleged that providing funds for use by the Charlotte-Mecklenburg Board of Education was not "necessary or expedient" since the purpose of those funds was to compensate the Board of Education for transferring land to the County in order to facilitate "a private development to be known as Brooklyn Village." Finally, Plaintiff alleged that the Board had "failed to consider whether

5. As we understand the record, the proceeds derived from the COPS Financing were to be used for a number of purposes other than facilitating the transactions that are under consideration in this case.

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

issuance of bonds would be preferable to the COPS Financing;” that “the price to be paid for the Assemblage parcels is inflated and excessive and an abuse of discretion of the Board;” that “the creation of additional debt pursuant to the COPS Financing Resolution will violate the County’s own prescribed debt management procedures and policies;” that “the record before the Board and disclosed in the Application does not prove or reasonably support the conclusion that any increase in taxes necessary to pay the obligations created by the COPS Financing will not be excessive;” and that, for these reasons, “the COPS Financing Resolution is unlawful and constitutes a manifest abuse of discretion of the Board” and “should be declared null and void, unlawful and should be set aside and rendered invalid.” In granting Defendants’ motion for judgment on the pleadings with respect to the fourth claim for relief, the trial court stated that “[t]he resolution authorizing the County to seek COPS funding contains specific findings that such financing was necessary and expedient, that it was preferable to bond issues under current circumstances facing the County, and that the County’s debt management procedures are good and are managed in strict compliance with the law.” The trial court also noted that “Plaintiff’s allegations, in the face of these findings, are merely conclusory and do not allege the facts necessary to establish a manifest abuse of discretion by the County,” particularly given that “[t]he decision on how to structure a County’s debt—through the issuance of bonds of COPS—is peculiarly within the discretion of the County and Plaintiff’s allegation that bonds are preferable, without more to demonstrate why they are preferable and why these facts make the County’s decision a manifest abuse of discretion, is insufficient.” Once again, we conclude that the trial court correctly granted judgment on the pleadings in favor of Defendants with respect to Plaintiff’s fourth claim for relief.⁶

On appeal, Plaintiff contends that the trial court erred in granting judgment on the pleadings in favor of Defendants with respect to the fourth claim for relief because the relevant portions of the complaint alleged that “the COPS financing exceeded the County’s debt limit ratios” and because he has alleged “numerous facts that call into question the validity and accuracy of the ‘findings’ in the Resolution.” In support of the first of these two arguments, Plaintiff cites *Robins v. Town of Hillsborough*, 361 N.C. 193, 639 S.E.2d 421 (2007), for the

6. At trial and on appeal, Plaintiff acknowledges that the issue of whether the LGC should have approved the County’s application for authorization to engage in COPS financing must be decided through the administrative review process and is not properly before the Court in this case.

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

proposition that “the failure of a local governmental unit to follow its own adopted procedures renders the actions of such unit void.” Although the Supreme Court did state in *Robins* that “this Court has held town boards to their own rules of procedure,” 361 N.C. at 198, 639 S.E.2d at 424, the record in this case provides no indication that the County debt management policies and procedures upon which Plaintiff relies are anything other than policy-based guidelines. Furthermore, although Plaintiff has alleged a series of reasons why he disagrees with the factual predicate upon which the County Commission based its decision to apply for approval of COPS financing, the “facts” upon which he relies represent, at bottom, nothing more than a policy-based disagreement with the Board’s decision rather than a demonstration that the Board manifestly abused its discretion. Were we to allow Plaintiff to proceed to trial on the basis of allegations such as those set forth in his fourth claim for relief, we would have effectively eviscerated the rule providing that “ ‘a mere assertion of a grievance’ against a governmental entity is insufficient to state a claim for relief.” *Reese I*, — N.C. App. at —, 676 S.E.2d at 489. As a result, the trial court correctly granted judgment on the pleadings in favor of Defendants with respect to Plaintiff’s fourth claim for relief.

4. Third Claim for Relief

[5] In his third claim for relief, Plaintiff alleged that, on 4 December 2007, “the Board adopted that certain Park Land Acquisition Capital Project Ordinance appropriating the sum of \$19,000,000 for the purpose of providing funds for the acquisition of land for an urban park facility;” that “the proposed purchase by the County of the Assemblage is unlawful, unauthorized and a manifest abuse of discretion” for the reasons set forth in the first and second claims for relief; that “[t]he Park Land Ordinance anticipates that funds to reimburse the appropriations would be made available from the proceeds of installment financing during the 2008 fiscal year;” that, as alleged in the fourth claim for relief, “the anticipated funding is contrary to the standards established by statute for such financing” so that “the funds anticipated from the installment financing will not be available to reimburse Defendant County for any expenditures made pursuant to the Park Land Ordinance;” and that, “[s]ince the Park Land Ordinance is unlawful and since the source of reimbursement is also unlawful,” the Park Land Ordinance should be nullified and set aside. The trial court granted Defendants’ motion for judgment on the pleadings with respect to the third claim for relief on the grounds that,

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

“[b]ecause this Court has found that Plaintiff’s first two claims fail as a matter of law in light of the totality of the pleadings, this Third Claim fails as well.” Similarly, having concluded that the trial court properly granted judgment on the pleadings in favor of Defendants with respect to the first, second, and fourth claims for relief asserted in Plaintiff’s complaint, we conclude that the trial court did not err by granting judgment on the pleadings with respect to the third claim for relief asserted in Plaintiff’s complaint as well.

5. Fifth Claim for Relief

[6] Finally, Plaintiff alleged in his amended fifth claim for relief that, “since the [LGC] certificate approving the Application is fatally flawed and void, it is unlawful for any officer, employer or agent of Defendant to make any payment under the COPS Financing contracts and Plaintiff is entitled to permanent injunction barring such payments.” The trial court found that Plaintiff’s pleading “reveals on its face that the Plaintiff is vigorously pursuing his administrative remedies” and that “the Plaintiff has not exhausted his remedies,” thereby depriving the trial court of the “subject matter jurisdiction to consider” Plaintiff’s fifth claim for relief. As a result, the trial court dismissed Plaintiff’s fifth claim for relief.

On appeal, Plaintiff contends that the trial court erred by dismissing the fifth claim for relief on the grounds that this action and the related administrative litigation in which he is also involved address two different issues. On the one hand, Plaintiff contends that the administrative litigation involves “the validity of the approval of the Application and issuance of the approval certificate by the LGC.” On the other hand, Plaintiff contends that this case involves a challenge to “the validity of the COPS contracts under N.C. Gen. Stat. § 159-149.” Although Plaintiff concedes that “the resolution of the Administrative Appeal will establish a critical fact in the resolution of the Fifth Claim” and that his fifth claim for relief will fail in the event that “the LGC certificate is determined in the Administrative Appeal to be valid,” Plaintiff contends that the trial court should have “granted Plaintiff’s motion to stay this action pending final resolution of the Administrative Appeal” rather than dismissing his fifth claim for relief.

A careful analysis of the allegations of Plaintiff’s amended fifth claim for relief indicates that it is predicated upon allegations that, “since the certificate of the [LGC] approving the Application is fatally flawed and void, it is unlawful for any officer, employer or agent of

REESE v. MECKLENBURG CNTY., N.C.

[204 N.C. App. 410 (2010)]

Defendant to make any payment under the COPS Financing contracts” and that, “[b]ased upon the reasoned analysis and decision of Judge Morrison and the presumption of correctness of the ALJ decision, it is likely that Plaintiff will prevail on the merits of this Fifth Claim by (1) adoption by the Commission of the ALJ Decision requiring a review of the Application by the full Commission *de novo* pursuant to N.C. Gen. Stat. § 159-4(b), and (2) the subsequent denial of the Application by the full Commission on the grounds that the information contained in the application is insufficient to support approval of the Application in accordance with the standards set out in N.C. Gen. Stat. § 159-151(b).” In light of these allegations, Plaintiff contends that “the officers, employees and agents” of the County should be enjoined from “mak[ing] payments under the COPS Financing contracts.” We are unable to read these allegations to constitute anything other than a prediction that Plaintiff will prevail in the related administrative litigation and that, given his likely victory in that forum, the trial court should enjoin the County from making payments under the COPS financing contracts. In view of the fact that the factual prerequisite for the maintenance of Plaintiff’s fifth claim for relief had not occurred and might never occur and since Plaintiff appears to concede that the correct forum for consideration of the appropriateness of the LGC’s decision to approve the County’s application for approval of COPS financing is in the administrative arena, we conclude that the trial court did not, in fact, have subject matter jurisdiction over Plaintiff’s fifth claim for relief and properly dismissed it. *Vass v. Board of Trustees*, 324 N.C. 402, 408-09, 379 S.E.2d 26, 30 (1989) (holding that a trial court lacked subject matter jurisdiction to conduct a judicial review proceeding under the Administrative Procedures Act where “the plaintiff had not exhausted the administrative remedies available to him under the Act”). Thus, the trial court did not err by dismissing Plaintiff’s amended fifth claim for relief for lack of subject matter jurisdiction.⁷

C. Plaintiff’s Additional Arguments

In addition to the arguments discussed above, Plaintiff contends that the trial court erred by striking the notice of *lis pendens*, granting judgment on the pleadings for 300 South Church Street and RBC for additional reasons not discussed above, and denying his motion to convert Defendants’ motion for judgment on the pleadings to a mo-

7. Plaintiff’s reliance on *Nello L. Teer Co., Inc. v. Jones Bros., Inc.*, 182 N.C. App. 300, 641 S.E.2d 832 (2007), is misplaced given that the issue of the trial court’s subject matter jurisdiction was not at issue in that case.

STATE v. WALKER

[204 N.C. App. 431 (2010)]

tion for summary judgment. Although we believe that Defendants' contention that Plaintiff has not properly taken an appeal from the trial court's orders that address these issues may well have merit, given our conclusion that judgment on the pleadings was proper in favor of Defendants County and Facilities Corporation, we believe that Plaintiff's additional arguments have been rendered moot to the extent that they are properly before us. For that reason, we decline to address Plaintiff's remaining arguments on appeal.

III. Conclusion

As a result, we conclude that Plaintiff has failed to demonstrate that the trial court committed any error of law in the orders which he has challenged on appeal. Thus, the trial court's orders should be, and hereby are, affirmed.

Affirmed.

Chief Judge MARTIN and Judge JACKSON concur.

STATE OF NORTH CAROLINA v. WILLIAM TYNNELL WALKER

NO. COA09-977

(Filed 15 June 2010)

1. Evidence— out-of-court statement—generally consistent with in-court testimony

The trial court did not err by allowing an officer to testify concerning an out-of-court statement by a witness in a prosecution that resulted in an assault conviction. Although the out-of-court statement contained information that did not appear in the witness's in-court testimony, the out-of-court statement was generally consistent with her trial testimony. Furthermore, the trial court gave a limiting instruction.

2. Assault— knife as a deadly weapon—evidence sufficient

The defendant introduced sufficient evidence that a knife was a deadly weapon where the record established that the knife wielded by defendant produced wounds to the victim's lip, arm, and back; caused a puncture wound to the victim's lung; resulted

STATE v. WALKER

[204 N.C. App. 431 (2010)]

in substantial bleeding; and inflicted injuries requiring significant medical treatment. The fact that the State did not introduce the knife in question did not bar a finding that a deadly weapon was used during the assault.

3. Assault— serious injury—evidence sufficient

The trial court did not err by concluding that there was sufficient evidence to permit a jury finding that an assault defendant inflicted a serious injury on the victim.

4. Appeal and Error— criminal trial—civil judgment recommended—no judgment in record—no appellate jurisdiction

The Court of Appeals did not have jurisdiction to review a criminal defendant's challenge to the trial court's "recommendation" that a civil judgment be entered for attorney fees for his prior court-appointed counsel where the record on appeal did not contain a civil judgment to that effect.

Appeal by defendant from judgment entered 15 May 2009 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 10 December 2009.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

Irving Joyner, for Defendant.

ERVIN, Judge.

Defendant William Tynell Walker appeals from a judgment in which the trial court sentenced Defendant to a minimum of 41 months and a maximum of 59 months imprisonment in the custody of the North Carolina Department of Correction and recommended the entry of a "civil judgment" against Defendant for "prior attorney fees" in the amount of \$1,762.50 based on his conviction for assault with a deadly weapon inflicting serious injury. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we find no basis for disturbing Defendant's conviction and conclude that we lack jurisdiction to address Defendant's challenge to the trial court's attorney's fee "recommendation."

STATE v. WALKER

[204 N.C. App. 431 (2010)]

I. Factual BackgroundA. Substantive Facts

Rodney Maurice Sanders, Jr., and Leticia Williams lived together with their child in Jacksonville, North Carolina. On the early afternoon of 24 June 2008, Mr. Sanders was watching television in the bedroom of their home while their child, who was only a baby, was in a crib “[i]n the front room[.]”

According to Ms. Williams, Defendant was her “cousin.” However, she had not seen him since “[she] was younger.” At around 1:00 p.m., Defendant knocked at the front door of the home occupied by Ms. Williams and Mr. Sanders. After Ms. Williams allowed him to enter, Defendant told Williams that he “wanted to see the baby[.]” In light of that request, Ms. Williams testified that “we sat down [and] played with the baby for a while.”

During their conversation, Ms. Williams told Defendant that she and Mr. Sanders had been “arguing[.]” Defendant replied that “he wanted to talk to [Mr. Sanders].” Ms. Williams said Defendant “knocked on the [bedroom] door[.]” which was already broken and not supported by hinges, and “the door fell in.” Mr. Sanders “stood up,” at which point “they started fighting.” Ms. Williams testified that Defendant had a “small” knife in his hand, which was “about three inches” long.

Mr. Sanders testified that Defendant knocked on the bedroom door and that “[he] just remember[ed] the door [to the bedroom] coming down, because it was already broken.” Mr. Sanders stood up as soon as the door fell. Defendant and Mr. Sanders “immediately . . . started wrestling around[.]” Mr. Sanders did not have a weapon and did not recall seeing one in Defendant’s possession. In the course of the fight, both Mr. Sanders and Defendant fell and a window in the bedroom shattered. Although Mr. Sanders was “cut” during the fight, he did not realize he was injured until the fight was over, when he noticed that he was bleeding.

After the fight ended, Defendant “ran out of the house[.]” Ms. Williams noticed that Mr. Sanders was “bleeding a lot[.]” More particularly, Mr. Sanders was bleeding from his back, his face, and his arm. Mr. Sanders and Ms. Williams called 911, while a neighbor applied pressure to Mr. Sanders’ wounds in an attempt to slow the bleeding until emergency medical service personnel arrived and took him to Onslow Memorial Hospital. At the hospital, the examining physician

STATE v. WALKER

[204 N.C. App. 431 (2010)]

determined that Mr. Sanders had been “cut” a number of times and had sustained a “puncture wound in [his] lung[.]” For that reason, Mr. Sanders was placed on a ventilator. Although Mr. Sanders thought that he had been stabbed about five times, an examination of photographs taken at the hospital revealed that he had been “stabbed” or cut approximately “eight or nine” times.

Officer Daniel Gallardo of the Jacksonville Police Department was dispatched to the residence occupied by Mr. Sanders and Ms. Williams on 24 June 2008. As Officer Gallardo “walked up to the front door[.]” he “observed the victim lying on the [kitchen] floor” in pain and “spitting up blood[.]” Officer Gallardo noticed blood in the bathroom, in the kitchen sink, on the kitchen floor, and on the front steps. In addition, Officer Rodney Dorn of the Jacksonville Police Department noticed “a large amount of blood” on the kitchen floor and blood on the bathroom sink, the bathroom walls, and some glass on the bedroom floor.

B. Procedural History

On 24 June 2008, a warrant for arrest charging Defendant with assault with a deadly weapon with intent to kill inflicting serious injury and attempted murder was issued by Magistrate Christopher T. Riggs. On 7 April 2009, the Onslow County grand jury returned a bill of indictment charging Defendant with attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury. The charges against Defendant came on for trial before the trial court and a jury at the 11 May 2009 criminal session of the Onslow County Superior Court. After the presentation of the State’s evidence and after Defendant elected to rest without presenting any evidence, the trial court allowed Defendant’s motion to dismiss the attempted murder charge and concluded that the evidence was insufficient to support a finding that Defendant acted with the intent to kill.¹ On 13 May 2009, a jury returned a verdict finding Defendant guilty of assault with a deadly weapon inflicting serious injury. At the ensuing sentencing hearing, the trial court found that Defendant should be sentenced as a Level IV offender and ordered that Defendant be imprisoned in the custody of the North Carolina Department of Correction for a minimum term of 41 months and a maximum term of 59 months. In addition, the trial court’s judgment “recommends” the

1. Although the record does not contain any additional information relating to such a charge, at the conclusion of all of the evidence the trial court also dismissed a felonious breaking or entering charge that had apparently been lodged against Defendant.

STATE v. WALKER

[204 N.C. App. 431 (2010)]

entry of a “civil judgment” for “prior attorney fees” in the amount of \$1,762.50. Defendant noted an appeal to this Court from the trial court’s judgment.

II. Legal Analysis

A. Admission of Prior Statement

[1] First, Defendant contends that the trial court erred by allowing Officer Dorn to testify concerning an out-of-court statement made by Ms. Williams. In essence, Defendant argues that the trial court’s ruling contravened N.C. Gen. Stat. § 8C-1, Rule 607, by allowing the State to impeach Ms. Williams through the introduction of prior inconsistent statements into evidence despite the fact that those statements were “collateral” testimony rendered inadmissible by virtue of decisions such as *State v. Hunt*, 324 N.C. 343, 348, 378 S.E.2d 754, 757 (1989) (stating “that cross-examination of a party’s own witness [is] governed by the same rules that govern the cross-examination of witnesses called by the opposing party[,]” including “the rule that extrinsic evidence of prior inconsistent statements may not be used to impeach a witness where the questions concern” collateral issues). We disagree.

“Prior consistent statements of a witness are admissible for purposes of corroboration even if the witness has not been impeached.” *State v. Swindler*, 129 N.C. App. 1, 4, 497 S.E.2d 318, 320, *aff’d*, 349 N.C. 347, 507 S.E.2d 284 (1998), (citing *State v. Riddle*, 316 N.C. 152, 157, 340 S.E.2d 75, 78 (1986)). “When so offered, evidence of a prior consistent statement must in fact corroborate a witness’s later testimony[;] [h]owever, there is no requirement that the rendition of a prior consistent statement be identical to the witness’s later testimony.” *Swindler*, 129 N.C. App. at 5, 497 S.E.2d at 320. “ ‘[S]light variances in the corroborative testimony do not render it inadmissible.’ ” *Id.* (quoting *State v. Covington*, 290 N.C. 313, 337, 226 S.E.2d 629, 646 (1976)). “In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness’s testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony.” *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573 (1986) (citing *Riddle*, 316 N.C. at 156-57, 340 S.E.2d at 77-78; *State v. Higgerbottom*, 312 N.C. 760, 768-69, 324 S.E.2d 834, 840 (1985); *State v. Burns*, 307 N.C. 224, 231, 297 S.E.2d 384, 388 (1982); *State v. Ollis*, 318 N.C. 370, 348 S.E.2d 777 (1986)).

STATE v. WALKER

[204 N.C. App. 431 (2010)]

In order to be admissible as corroborative evidence, a witness' prior consistent statements merely must tend to add weight or credibility to the witness' testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates.

State v. Walters, 357 N.C. 68, 89, 588 S.E.2d 344, 356, *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320 (2003) (quoting *State v. Farmer*, 333 N.C. 172, 192, 424 S.E.2d 120, 131 (1993) (internal citations omitted)). "Moreover, 'if the previous statements are generally consistent with the witness' testimony, slight variations will not render the statements inadmissible, but such variations . . . affect [only] the credibility of the statement.'" *Walters*, 357 N.C. at 89, 588 S.E.2d at 356 (quoting *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983)). On the other hand, "the witness's prior statements as to facts not referred to in his trial testimony and *not tending to add weight or credibility* to it are not admissible as corroborative evidence[;] [a]dditionally, the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony." *Ramey*, 318 N.C. at 469, 349 S.E.2d at 573 (emphasis in original). "A trial court's determination that evidence is admissible as corroborative evidence is reviewed for abuse of discretion." *State v. Cook*, — N.C. App. —, —, 672 S.E.2d 25, 33 (2009) (citing *Covington*, 290 N.C. at 337, 226 S.E.2d at 645-46).

At trial, Ms. Williams testified on direct examination as follows:

Q: . . . Had [Defendant] been to your house before June 24th?

A: Not that I remember.

. . . .

Q: . . . Did you talk to him at the door, or did you step out on the porch?

A: I stepped out on the porch, at first, and then I let him in, after.

Q: Why did you let [Defendant] in?

A: Because he wanted to see the baby, for one, and I had already been talking to him, because I was telling him about me and my boyfriend . . . arguing, and he just wanted—he said he wanted to talk to [Mr. Sanders].

. . . .

STATE v. WALKER

[204 N.C. App. 431 (2010)]

Q: Where was Mr. Sanders, at this time?

A: Sitting down in the [bed]room.

....

Q: Now, when you answered the door, did you have the baby in your arms?

A: Yes.

....

Q: What did [Defendant] do, once you got inside?

A: Well, . . . I started to tell him about me and [Mr. Sanders] arguing, and he asked me why [we were] arguing, and I told him about it. And then—so he knocked on—he said that he wanted to talk to [Mr. Sanders], and he knocked on—so I told him [Mr. Sanders] was in the [bed]room. He knocked on the door and the door fell in.

Q: What did he do, once the door fell in?

A: . . . [W]ell, I put the baby in the crib, and [Mr. Sanders] stood up and he walked towards [Defendant]. [Defendant] walked towards [Mr. Sanders], and then they started fighting.

....

Q: Why did you go in the room?

A: Because they were fighting, and I was trying to break it up.

Q: Why were you trying to break it up?

A: Because they were fighting. I'm not going to let them fight.

....

Q: Did you see [Defendant] with a knife?

A: After—after they were already by the window, after they had been fighting for a while.

Q: Where did he have the knife?

A: I don't remember.

Q: Was it in his hand?

A: Yeah.

STATE v. WALKER

[204 N.C. App. 431 (2010)]

Q: What was your feeling when you saw [Defendant] with a knife?

A: I just ran over there to try to stop both of them.

Q: Did you try to get in between them?

A: Yes.

Q: Did you try to grab the knife from [Defendant]?

A: No, because I couldn't think straight at the time.

Q: Why couldn't you think straight?

A: Because there was a lot of stuff going on.

Q: Did you see [Defendant] stab Mr. Sanders?

A: I don't remember. I just saw the knife, but I don't remember because, like I said, I couldn't think straight. There was a lot of stuff going on.

After the prosecutor refreshed Ms. Williams' recollection by showing Ms. Williams her written statement, Ms. Williams testified that:

Q: All right. Now, did you see [Defendant] stab Mr. Sanders?

A: I still don't remember. I guess so, but I don't remember.

Q: Did you write down that you saw that?

A: Yes, I wrote it.

Following a bench conference, the trial court gave the following limiting instruction to the jury concerning the purposes for which Ms. Williams' prior statement could be considered:

Okay. Ladies and gentlemen of the jury, when evidence has been received tending to show that, at an earlier time, the witness, Leticia Williams, made a statement which may be consistent with or may conflict with her testimony at this trial, you must not consider the earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made to this witness or this officer and that it is consistent or does conflict with the testimony of Leticia Williams at this trial, then you may consider this, together with all other facts and circumstances, bearing upon Leticia Williams' truthfulness in deciding whether you'll believe or disbelieve that witness' testimony at this trial.

STATE v. WALKER

[204 N.C. App. 431 (2010)]

After the trial court's limiting instruction, Officer Dorn testified that:

[Ms. Williams] stated that the Friday previous to the incident, which would have been June 20th, that a black male came to her residence with her godmother, Darlene Jackson, and that they had come to speak with her, as well as her boyfriend, Mr. Sanders, about problems they were having in their relationship; however, Ms. Williams was not home on this evening. So she stated that her godmother, Ms. Jackson, as well as the individual she only knew as Bill, a black male, had a conversation with Mr. Sanders at the residence, in her absence.

She then stated that, on this day the incident occurred, which was June 24th, that [Defendant] returned to the residence and informed her that he had just stopped by to check on her. She stated that they were having this conversation on the deck and that, while having this conversation, she asked the subject, [Defendant], for some—if she could borrow a few dollars because Mr. Sanders had just used the last bit of her money to pay a bill.

She said, at that time, that the individual, [Defendant], asked where Mr. Sanders was, and she advised him that he was inside, watching TV. During this conversation, she stated that she asked [Defendant] why he was inquiring, and if [Mr. Sanders] needed to come out and talk to him, and he said no. She stated that she again asked why he was inquiring about Mr. Sanders' whereabouts, and that he told her not to worry about it.

Ms. Williams told me, at that time, that she was holding her daughter while standing there, talking to the subject that she referred to as [Defendant], when that subject pushed her out of the way and ran into the residence. She stated the subject knocked down the door to Mr. Sanders' bedroom and a fight ensued. She could hear a scuffle. She stated that she set her daughter down and ran inside to find out what was taking place in the bedroom, at which time she saw the subjects fighting.

She said she could see [Defendant] making stabbing motions at [Mr. Sanders'] back, and she saw a pocket knife and attempted to stop [Defendant]. She said, at that time, [Defendant] reportedly told Ms. Williams to get the F off of her, the word—I'll spare you from the language—and she was unable to break them up. She said shortly after that, that [Defendant] fled and left the residence on foot, and that she attempted to stop the bleeding because Mr.

STATE v. WALKER

[204 N.C. App. 431 (2010)]

Sanders was having problems breathing and she ran next door to call for help.

Despite the fact that Ms. Williams' out-of-court statement² to Officer Dorn contained information that did not appear in her in-court testimony, her out-of-court statement was generally consistent with the account of the events that occurred on 24 June 2008 that she gave at trial. Although Ms. Williams' out-of-court statement included the statement that Defendant had come to her house on the preceding Friday with her godmother and that she had seen Defendant stabbing Mr. Sanders and although Ms. Williams disclaimed any memory of having seen Defendant at her residence prior to 24 June 2008 or the actual stabbing in her trial testimony, Ms. Williams did not directly deny that she had seen Defendant prior to 24 June 2008 or that she had seen Defendant stabbing Mr. Sanders in her trial testimony. Instead, she simply said that she did not remember either of those events occurring. Furthermore, she did explicitly testify that she had seen Defendant with a knife during his attack on Mr. Sanders. At bottom, Ms. Williams' trial testimony constituted a description, albeit a less-complete one, of the same events described in her out-of-court statement, a fact which means that her out-of-court statement tended to add weight and credibility to her trial testimony despite the fact that she denied any memory of certain events that she described in her out-of-court statement. Furthermore, the trial court gave a limiting instruction that informed the jury that it was only permitted to consider Ms. Williams' out-of-court statements for the purpose of evaluating her credibility and not for substantive purposes, thus ensuring that Defendant would not be prejudiced by the variations between Ms. Williams' trial testimony and her statement to Officer Dorn. *See State v. Harris*, 189 N.C. App. 49, 57, 657 S.E.2d 701, 707, *disc. review denied*, 362 N.C. 366, 664 S.E.2d 315 (2008). As a result, we believe that Ms. Williams' out-of-court statement was properly admitted for corroborative purposes and that the trial court, by delivering a limiting instruction that has not been challenged on appeal, acted to ensure that the jury only considered that statement for the non-hearsay purpose of evaluating the credibility of Ms. Williams' trial testimony.

Although Defendant views the relevant legal issues through an entirely different lens, we are not persuaded that Defendant's ap-

2. The statement that Officer Dorn testified to at trial was a different statement than the written statement that was shown to Ms. Williams on direct examination in an attempt to refresh her recollection.

STATE v. WALKER

[204 N.C. App. 431 (2010)]

proach is correct. In order to adopt Defendant's approach, we would first have to conclude that the State introduced the out-of-court statement that Ms. Williams gave to Officer Dorn for the purpose of impeaching her testimony. Despite Defendant's repeated insistence that the State's real motive for introducing Ms. Williams' out-of-court statement was impeachment rather than corroboration, we are not, based on our review of the record, persuaded by his contention.³ In addition, Defendant argues that "[j]urors were presented with two different versions of the events of" 24 June 2008," one of which was contained "in [Ms.] Williams' trial testimony" and the "other [of which] was presented in the hearsay statements which were presented by [Officer] Dorn for the sole purpose of undermining [Ms.] Williams' credibility," and that "[t]he jurors chose to accept [Officer] Dorn's testimony regarding the out-of-court statements allegedly made by [Ms.] Williams as the correct version of what happened on" 24 June 2008. We are not persuaded by this component of Defendant's argument, which assumes that the jury used Ms. Williams' out-of-court statement for substantive purposes, either, since the trial court's limiting instruction clearly prohibited the jury from using Ms. Williams' out-of-court statement in that manner,⁴ *see Harris*, 189

3. The State might well have been authorized to use Ms. Williams' out-of-court statement for impeachment purposes without confronting her with the statement described by Officer Dorn given that the extent to which she actually saw Defendant stabbing Mr. Sanders went to a material issue in the case. *State v. Mack*, 282 N.C. 334, 340, 193 S.E.2d 71, 75 (1972) (stating that "[w]hether a foundation must be laid before a prior inconsistent statement may be shown depends on whether the prior inconsistency relates to a matter pertinent and material to the pending inquiry, or is merely collateral[;]" "[i]f the former, the statement may be shown by other witnesses without the necessity of first laying a foundation therefor by cross-examination") (emphasis in the original) (citing *State v. Wellmon*, 222 N.C. 215, 22 S.E.2d 437 (1942); *State v. Carden*, 209 N.C. 404, 183 S.E. 898 (1936); *Jones v. Jones*, 80 N.C. 246 (1879); *State v. Patterson*, 24 N.C. 346 (1842); Stansbury, N.C. Evidence § 48 (2d ed. 1963). The decisions upon which Defendant relies, such as *Hunt*, 324 N.C. at 348, 378 S.E.2d at 759; *State v. Williams*, 322 N.C. 452, 455, 368 S.E.2d 624, 626 (1988); and *State v. Jerrells*, 98 N.C. App. 318, 321, 390 S.E.2d 722, 724 (1990), are "inapposite" because the collateral matter at issue in those decisions was whether the defendant made the statement with which the State sought to impeach the defendant. *State v. Ricard*, 142 N.C. App. 298, 302-03, 542 S.E.2d 320, 323 (2001). However, since Ms. Williams was called to testify by the State and since the record does not establish that the prerequisites that must be met in order for the State to be allowed to impeach its own witness as set out in *Hunt*, 324 N.C. at 349, 378 S.E.2d at 757, have been met, we do not believe that we have sufficient basis for concluding that the State had the right to impeach Ms. Williams' testimony at Defendant's trial.

4. As we noted in our discussion of the extent to which Ms. Williams' out-of-court statement corroborated her trial testimony, we are not convinced that there is any material difference between the description of the events that occurred on 24 June 2008 in Ms. Williams' trial testimony and in her out-of-court statement. Although Ms.

STATE v. WALKER

[204 N.C. App. 431 (2010)]

N.C. App. at 57, 657 S.E.2d at 707 (stating that, “[a]dmittedly, portions of [the witness’s] out-of-court statements to [the officer] contained information that [the witness] did not include in her in-court testimony[;] [h]owever, the differences between [the witness’s] in-court and out-of-court statements are not contradictory[;] [r]ather, [the witness’s] trial testimony was simply a less-complete statement of the events than her out-of-court statement to [the officer]”). We also note that it is presumed that the jury followed the trial court’s instructions. *State v. Trull*, 349 N.C. 428, 455, 509 S.E.2d 178, 196 (1998) (stating that “jurors are presumed to pay close attention to the particular language of the judge’s instructions in a criminal case . . . and [to] follow the instructions as given”). As a result, for the reasons stated above, we conclude that this case does not involve the improper admission of a prior inconsistent statement in violation of N.C. Gen. Stat. § 8C-1, Rule 607; that the present issue is more appropriately addressed under the rules applicable to the admission of corroborative testimony; and that the trial court did not abuse its discretion by allowing the admission of Officer Dorn’s testimony for the purpose of corroborating Ms. Williams’ trial testimony.

B. Motion to Dismiss

Secondly, Defendant contends that the trial court erred by failing to dismiss the charge of assault with a deadly weapon inflicting serious injury for insufficiency of the evidence. More specifically, Defendant contends that there is insufficient evidence to establish that he used a “deadly weapon” during his assault on Mr. Sanders and that Mr. Sanders sustained a “serious injury.” We disagree.

1. Standard of Review

N.C. Gen. Stat. § 14-32(b) provides that “[a]ny person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon.” N.C. Gen. Stat. § 14-32(b). “‘The elements of a charge under [N.C. Gen. Stat.] § 14-32(b) are (1

Williams explicitly stated that she saw Defendant stabbing Mr. Sanders in her out-of-court statement and not in her trial testimony, she clearly stated that she saw Defendant with a knife during his assault on Mr. Sanders. In addition, while Defendant suggests in his brief that Mr. Sanders’ injuries could have come from falling on glass that came from the broken bedroom window, the number of wounds sustained by Mr. Sanders, the distribution of the wounds on Mr. Sanders’ body, and the fact that one of them punctured his lung poses certain problems for Defendant’s argument. Thus, while we need not reach the issue of prejudice in order to address Defendant’s challenge to the trial court’s ruling, a legitimate argument can be made that there is no reasonable possibility that the outcome would have been different had the trial court not allowed the admission of Ms. Williams’ out-of-court statement.

STATE v. WALKER

[204 N.C. App. 431 (2010)]

an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death.’ ” *State v. Ryder*, — N.C. App. —, —, 674 S.E.2d 805, 812 (2009) (quoting *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990)).

When reviewing a challenge to the denial of a defendant’s motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines “whether the State presented ‘substantial evidence’ in support of each element of the charged offense.” *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005)). “ ‘Substantial evidence’ is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.” *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (quoting *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005)). “In this determination, all evidence is considered ‘in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.’ ” *Id.* (citation omitted). “The defendant’s evidence, unless favorable to the State, is not to be taken into consideration,” *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971), except that, “when it is consistent with the State’s evidence, the defendant’s evidence ‘may be used to explain or clarify that offered by the State.’ ” *State v. Denny*, 361 N.C. 662, 665, 652 S.E.2d 212, 213 (2007) (quoting *Jones*, 280 N.C. at 66, 184 S.E.2d at 866 (citation omitted)). Additionally, a “ ‘substantial evidence’ inquiry examines the sufficiency of the evidence presented but not its weight,” which remains a matter for the jury. *McNeil*, 359 N.C. at 804, 617 S.E.2d at 274 (citation omitted). Thus, “if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.” *Id.* (citation omitted).

2. Deadly Weapon

[2] On appeal, Defendant contends that, because the State did not introduce the knife into evidence at trial and because Mr. Sanders’ injuries could have been caused by glass stemming from the broken window, the State failed to elicit sufficient evidence to support a finding that Defendant employed a deadly weapon. However, after carefully examining the record in light of the applicable law, we conclude that Defendant’s argument is not persuasive.

At trial, Ms. Williams testified that Defendant held a knife in his hand during his fight with Mr. Sanders. According to Ms. Williams, the

STATE v. WALKER

[204 N.C. App. 431 (2010)]

knife was approximately three inches long. Ms. Williams also testified that Mr. Sanders bled “a lot” from his wounds, having dripped blood throughout the residence. Officer Gallardo “observed the victim lying on the floor” in pain and “spitting up blood[.]” Officer Dorn stated that there was blood in the bedroom, bathroom and kitchen of the home. Mr. Sanders testified that he was stabbed or cut eight or nine times and had wounds on his lip, his back, and his arm. Mr. Sanders was removed from his residence “on a stretcher” and remained in the emergency room for twelve hours, during which time he received a “chest tube” to “drain blood[.]” stitches in his back and arm, and was placed on a “ventilator” as a result of a “puncture wound in [his] lung[.]” Mr. Sanders also received “[p]ain medication” for approximately one week. At the trial approximately two years after the incident, Mr. Sanders still had visible scars on his lip, arm, and back.

A deadly weapon is one which, under the circumstances of its use, is likely to cause death or great bodily harm. *State v. Strickland*, 290 N.C. 169, 178, 225 S.E.2d 531, 538 (1976). “The definition of a deadly weapon clearly encompasses a wide variety of knives[;] [f]or instance, a hunting knife, a kitchen knife and a steak knife have been denominated deadly weapons *per se*.” *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 726 (1981). “A pocketknife is also unquestionably capable of causing serious bodily injury or death[,] [and] [i]n *State v. Collins*, the Court opined that a pocketknife, having a blade two and a half inches long, was a deadly weapon as a matter of law.” *Sturdivant*, 304 N.C. at 301, 283 S.E.2d at 726 (citing *State v. Collins*, 30 N.C. 407, 409, 412 (1848)). Similarly, a knife with a three-inch blade constitutes a deadly weapon *per se* when used as a weapon in an assault. *State v. Cox*, 11 N.C. App. 377, 380, 181 S.E.2d 205, 207 (1971). “Nevertheless, the evidence in each case determines whether a certain kind of knife is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death.” *Sturdivant*, 304 N.C. at 301, 283 S.E.2d at 726. “The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself.” *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924) (citations omitted). “No item, no matter how small or commonplace, can be safely disregarded for its capacity to cause serious bodily injury or death when it is wielded with the requisite evil intent and force.” *Sturdivant*, 304 N.C. at 301 n.2, 283 S.E.2d at 725 n.2 (citations omitted).

STATE v. WALKER

[204 N.C. App. 431 (2010)]

Defendant's challenge to the trial court's ruling with respect to the sufficiency of the evidence that he assaulted Mr. Sanders with a deadly weapon fails for several reasons. First, the Supreme Court has stated that "[w]e know of no rule of law . . . that requires the production of the alleged deadly weapon on the trial of a criminal prosecution for an assault with a deadly weapon[;]" "[i]n indeed, this Court recognizes that the weapon may not be produced." *State v. Randolph*, 228 N.C. 228, 231, 45 S.E.2d 132, 135 (1947). Thus, the fact that the State did not introduce the knife in question does not bar a finding that a deadly weapon was used during the assault. Secondly, this Court has previously held that a three-inch knife, when used in an assault, is a deadly weapon *per se*. *Cox*, 11 N.C. App. at 380, 181 S.E.2d at 207. Finally, the record supports a finding that the knife in question was a deadly weapon based on the effects resulting from its use. In *Sturdivant*, 304 N.C. at 302, 283 S.E.2d at 726, the Supreme Court stated that:

Defendant contends that the evidence was insufficient for the court to do so since the knife itself was not offered into evidence, and the victim failed to describe the length of the knife's blade. We disagree. The absence of such evidence was indeed a factor to be considered by the jury in its evaluation of the overall weight and worth of the State's case on this point. The omission was not, however, fatal as the State presented other evidence which permitted a rational trier of fact to conclude that the pocketknife was a deadly weapon. The victim's uncontroverted testimony revealed that, prior to the kidnapping and rape, defendant had used the pocketknife to open a can of oil. He later used this same knife to cut off the victim's slip. Defendant was a large man, approximately six feet tall and over 250 pounds. We believe that a knife sturdy enough to open a metal oil can and sharp enough to slash a piece of clothing could surely cause death or great bodily harm when wielded by a man of defendant's physical stature.

Similarly, in *State v. McCoy*, 174 N.C. App. 105, 114, 620 S.E.2d 863, 870 (2005), this Court opined that:

The State's evidence, including the documents from the domestic violence hearing which were admitted as substantive evidence, tended to show that the defendant stabbed Hunt five times with a knife causing wounds still visible some eight weeks after the assault. This evidence could adequately support an inference by the jury that the defendant assaulted Hunt with a deadly weapon.

STATE v. WALKER

[204 N.C. App. 431 (2010)]

As a result, it is clear that well-established principles of North Carolina law allow the extent to which a particular instrument is a deadly weapon to be inferred based on the effects resulting from the use made of that instrument. In this case, the record establishes that the knife wielded by Defendant produced wounds to Mr. Sanders' lip, arm, and back; caused a puncture wound to Mr. Sanders' lung; resulted in substantial bleeding; and inflicted injuries requiring significant medical treatment. The injuries produced by the knife at issue in this case are at least as significant as the effects deemed sufficient to support a finding that a knife was a deadly weapon in *Sturdivant* and *McCoy*. As a result, for all of these reasons, we conclude that the trial court did not err by concluding that the record contained sufficient evidence to support a finding that Defendant used a deadly weapon at the time that he assaulted Mr. Sanders.

3. Serious Injury

[3] In addition, Defendant challenges the trial court's refusal to grant his motion to dismiss predicated on the alleged absence of sufficient evidence that Mr. Sanders sustained a "serious injury" as a result of the assault committed by Defendant. In challenging the trial court's ruling, Defendant notes that "[t]here was no medical or expert testimony regarding the gravity of [Mr. Sanders'] injury[,] nor did [Mr.] Sanders testify that he experienced any pain and/or suffering." Once again, we do not find Defendant's challenge to the trial court's ruling persuasive.

"[T]he serious injury element of [N.C. Gen. Stat.] § 14-32" means "a physical or bodily injury." *State v. Everhardt*, 326 N.C. 777, 780, 392 S.E.2d 391, 392 (1990). "The courts of this [S]tate have declined to define serious injury for purposes of assault prosecutions other than stating that the term means physical or bodily injury resulting from an assault, and that 'further definition seems neither wise nor desirable.'" *State v. Morgan*, 164 N.C. App. 298, 303, 595 S.E.2d 804, 808-09 (2004). "Whether a serious injury has been inflicted is a factual determination within the province of the jury." *Morgan*, 164 N.C. App. at 303, 595 S.E.2d at 808-09. Among the factors that have been deemed relevant in determining whether serious injury has been inflicted are: (1) pain and suffering; (2) loss of blood; (3) hospitalization; and (4) time lost from work. *Id.* Evidence of hospitalization is not, however, necessary for proof of serious injury. *Id.* The "[c]ases that have addressed the issue of the sufficiency of evidence of serious injury appear to stand for the proposition that as long as the State

STATE v. WALKER

[204 N.C. App. 431 (2010)]

presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, it is for the jury to determine the question of whether the injury was serious.” *State v. Alexander*, 337 N.C. 182, 189, 446 S.E.2d 83, 87 (1994).

As we have previously noted, the evidence tends to show that Defendant held a three-inch knife during his assault on Mr. Sanders; that Mr. Sanders bled “a lot” from his wounds; that Mr. Sanders dripped blood throughout the residence; that there was blood in the bedroom, bathroom, and kitchen; and that Mr. Sanders was “lying on the floor” in pain and “spitting up blood” when Officer Gallardo arrived. Mr. Sanders testified that he was stabbed or cut eight or nine times and that he had wounds on his lip, his back, and his arm. Mr. Sanders was taken from his residence “on a stretcher” and transported to the emergency room, where he remained for twelve hours. While in the emergency room, Mr. Sanders received a “chest tube” to “drain blood[,]” stitches in his back and arm, and was placed on a “ventilator” as a result of a “puncture wound in [his] lung[.]” Mr. Sanders received “[p]ain medication” for approximately one week. At the trial, which was held approximately two years after the assault, Mr. Sanders still had visible scars on his lip, arm, and back.

As this summary indicates, the record does contain evidence addressing several of the “[r]elevant factors in determining whether serious injury has been inflicted[,]” including “(1) pain and suffering; (2) loss of blood; (3) hospitalization[.]” *Morgan*, 164 N.C. App. at 303, 595 S.E.2d at 808-09. In addition, the record establishes that Mr. Sanders received multiple stab wounds, sustained a punctured lung, had to be taken to the emergency room by emergency medical service personnel rather than getting himself there under his own power, and continued to show signs of injury some two years after the assault. As a result, we are unable to agree with Defendant’s contention that “there was nothing in the State’s evidence [that] would satisfy” the “great pain and suffering” standard and conclude that the State presented “evidence that the victim sustained a physical injury as a result of an assault by the defendant,” so that “it [was] for the jury to determine the question of whether the injury was serious.” *Alexander*, 337 N.C. at 189, 446 S.E.2d at 87. Thus, the trial court did not err by concluding that the record contained sufficient evidence to permit a jury finding that Defendant inflicted “serious injury” upon Mr. Sanders.

STATE v. WALKER

[204 N.C. App. 431 (2010)]

C. Judgment for Attorney's Fees

[4] Finally, Defendant contends that the trial court erred by ordering him to pay restitution in the amount of \$1,762.50 relating to the cost of his prior court-appointed counsel. According to Defendant, the trial court erred in requiring Defendant to pay restitution in this amount because “[t]here was absolutely no evidence presented . . . to support this order.” After reviewing the record in light of the applicable law, we conclude that we lack jurisdiction to consider Defendant’s challenge to this provision of the trial court’s judgment.

The judgment entered against Defendant in this case “recommends” the entry of a “CIVIL JUDGMENT PRIOR ATTORNEY FEES \$1,762.50.” The trial court noted on the judgment immediately below the provision that is the subject of Defendant’s challenge that “[a] hearing was held in open court in the presence of the defendant at which time a fee, including expenses, was awarded the defendant’s appointed counsel or assigned public defender.” However, the record does not contain a civil judgment in which Defendant is ordered to pay the cost of his court-appointed counsel in any amount.

According to well-established principles of North Carolina law, “the amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing.” *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995) (citing *State v. Daye*, 78 N.C. App. 753, 756, 338 S.E.2d 557, 560, *aff’d per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986)). Although the decisions of this Court and the Supreme Court establish that trial judges lack the authority to require or recommend the payment of restitution in the absence of sufficient evidence to support an award of restitution in the amount deemed appropriate, we do not believe that those decisions provide the appropriate yardstick by which to evaluate the lawfulness of the challenged provision of the present judgment. Instead, we believe that the present issue must be resolved based on the decisions of the Supreme Court and this Court concerning the recoupment of payments to court-appointed counsel from indigent defendants.

The State is reimbursed for payments made to court-appointed counsel by indigent defendants pursuant to the procedures outlined in N.C. Gen. Stat. § 7A-455 *et seq.* According to N.C. Gen. Stat. § 7A-455(b), “[i]n all cases the court shall direct that a judgment be entered in the office of the clerk of superior court for the money value of services rendered by assigned counsel[,] . . . which shall con-

STATE v. WALKER

[204 N.C. App. 431 (2010)]

stitute a lien as prescribed by the general law of the State applicable to judgments.”

The [S]tate assumes the status of a judgment lien creditor against the assets of an indigent defendant who has accepted court-appointed counsel and been found guilty of the offense. The lien is not valid unless the indigent defendant was given both notice of the [S]tate’s claim and the opportunity to resist its perfection in a hearing before the trial court. The lien is collectable through normal civil debt recovery procedures, but those assets and wages of the indigent necessary for his own or his family’s support and existence are not subject to garnishment or attachment.

Alexander v. Johnson, 742 F.2d 117, 120, n.5 (4th Cir. 1984) (citing N.C. Gen. Stat. §§ 1-362, 1C-1601; *State v. Crews*, 284 N.C. 427, 201 S.E.2d 840, 849 (1974); *State v. Stafford*, 45 N.C. App. 297, 262 S.E.2d 695, 697 (1980)).

In *Crews*, the Supreme Court vacated a judgment entered against an indigent defendant for the cost of court-appointed counsel on the basis of the following logic:

[D]efendant asserts that “[t]he court erred in entering an order and judgment against defendant for payment of counsel fees, said order appearing on page 9 of the petition for certiorari, dated February 16, 1973 and signed by Lupton, Judge.” . . . There appears in the record a judgment dated 16 February 1973 signed by Judge Lupton. This judgment provides for the recovery by the State of North Carolina from defendant of the sum of \$1,000.00 for services provided defendant as an indigent by the Public Defender. Presumably this judgment was entered pursuant to [N.C. Gen. Stat. §] 7A-455(b).

In his brief, defendant attacks this judgment on the following grounds: He asserts it was entered in his absence, without notice to him of any hearing with reference thereto, and without affording him any opportunity to be heard in connection therewith. He asserts further “that the judgment is in the nature of a civil judgment and there were not findings of fact nor conclusions of law sufficient to support such judgment pursuant to Rule 52 of the North Carolina Rules of Civil Procedure.[”]

The record before us affords no basis for passing upon the validity of this judgment. Nothing therein supports or negates defendant’s contentions. Under the circumstances, this Court, in

STATE v. WALKER

[204 N.C. App. 431 (2010)]

the exercise of its supervisory jurisdiction, vacates this civil judgment without prejudice to the State's right to apply for a judgment in accordance with [N.C. Gen. Stat. §] 7A-455 after due notice to defendant and a hearing on such application in the Superior Court of Guilford County.

Crews, 284 N.C. at 441-42, 201 S.E.2d at 849-50; *see also State v. Jacobs*, 361 N.C. 565, 566, 648 S.E.2d 841, 842 (2007) (concluding that “because there is no civil judgment in the record ordering defendant to pay attorney fees, the Court of Appeals had no subject matter jurisdiction on this issue”); *Stafford*, 45 N.C. App. at 300, 262 S.E.2d at 697 (stating that N.C. Gen. Stat. § 7A-455(b) “allows the court to enter a civil judgment against a convicted indigent for attorney’s fees and costs[,]” while vacating the civil judgment against the defendant because “there appears no indication that defendant received any opportunity to be heard on the matter”). As a result, a civil judgment entered against a convicted criminal defendant for the cost of court-appointed counsel lacks validity in the event that the defendant did not have a reasonable opportunity to be heard. However, the record on appeal submitted in connection with any appellate challenge to the validity of such a civil judgment must contain the civil judgment which the defendant seeks to challenge in order for the appellate court to have jurisdiction over the defendant’s claim.

Aside from the fact that Defendant makes no contention that he had no opportunity to be heard with respect to the amount of attorney’s fees awarded to his “prior” counsel, the absence of a civil judgment reflecting the trial court’s “recommendation” that such a judgment be entered relating to the fees awarded to Defendant’s prior court-appointed counsel deprives us of jurisdiction to review the challenged provision of the trial court’s judgment. *Jacobs*, 361 N.C. at 566, 648 S.E.2d 842. Such a ruling is consistent with considerations of sound appellate procedure, since proceeding to rule on Defendant’s challenge would put us in the position of evaluating the validity of a judgment that might, for all we know, have never been entered. Thus, we decline to entertain Defendant’s challenge to the provision of the trial court’s judgment “recommending” that a civil judgment be entered for the attorney’s fees awarded to Defendant’s prior court-appointed counsel.

III. Conclusion

As a result, we conclude that Defendant had a fair trial that was free from prejudicial error and that we have no jurisdiction to enter-

STATE v. FERGUSON

[204 N.C. App. 451 (2010)]

tain Defendant's challenge to the trial court's "recommendation" that a civil judgment be entered in the amount of the attorney's fees awarded to Defendant's prior court-appointed counsel. For this reason, we decline to grant Defendant's request for appellate relief from the trial court's judgment.

NO ERROR.

Judges STROUD and HUNTER, JR. concur.

STATE OF NORTH CAROLINA v. JESSICA SUE FERGUSON

No. COA09-1048

(Filed 15 June 2010)

1. Evidence— controlled substances—lay opinion testimony—no plain error

The trial court in a controlled substances case did not commit plain error by allowing a police officer to testify that substances found in a minivan and in defendant's pocketbook were marijuana. The decision in *State v. Llamas-Hernandez*, 363 N.C. 8, did not mandate a new trial in this case and the officer had as much or more training and experience in drug identification as the officer whose testimony was held admissible in *State v. Fletcher*, 92 N.C. App. 50.

2. Drugs— constructive possession—insufficient evidence—motion to dismiss improperly denied

The trial court erred in denying defendant's motion to dismiss charges of possession of marijuana where there was insufficient evidence that defendant constructively possessed the bags containing marijuana which were seized from a minivan.

Appeal by Defendant from judgment entered 6 January 2009 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 25 January 2010.

Roy Cooper, Attorney General, by Lars F. Nance, Special Deputy Attorney General, for the State.

Faith S. Bushnaq for the Defendant.

STATE v. FERGUSON

[204 N.C. App. 451 (2010)]

ERVIN, Judge.

Defendant Jessica Sue Ferguson appeals from a judgment entered based on her convictions for possession of marijuana with intent to sell or deliver; felonious possession of marijuana; possession of drug paraphernalia; and resisting, delaying, or obstructing a public officer. For the reasons discussed below, we vacate in part and remand for resentencing in part.

I. Factual Background

On 7 June 2007, Officer J.B. Smith of the University of North Carolina at Greensboro campus police arrested Defendant on charges of possession of marijuana with the intent to sell or deliver and resisting, delaying, and obstructing an officer. On 22 January 2008, Defendant was indicted for possession of marijuana with the intent to sell or deliver, felonious possession of marijuana, conspiracy to possess marijuana, possession of drug paraphernalia, and resisting, delaying, and obstructing an officer.

The charges against Defendant came on for trial before the trial court and a jury at the 5 January 2009 session of the Guilford County Superior Court. At trial, Officer Smith testified for the State that, on 7 June 2007, he was assigned to detect speeding motor vehicles using radar equipment. As Officer Smith and his partner operated a stationary radar instrument in the West Market Street area of Greensboro, he saw a Honda minivan traveling east on West Market Street at an estimated speed of 47 to 49 miles per hour in a 35 mile per hour zone. When he activated the blue light on his patrol vehicle, the minivan stopped and pulled to the right side of the road, paused briefly and then began to creep forward. Officer Smith and his partner exited their patrol car and walked towards the vehicle. As Officer Smith reached the back of the minivan, the driver looked out of the window and made a gesture suggesting that he was about to get out. After Officer Smith instructed the driver to remain in the minivan, the driver said “Okay, you want me to get back in the car,” then shut the door and drove off.

Officer Smith “ran and got back in the patrol car” and “began to go after the minivan.” The minivan turned onto “the first road on the right” and drove out of sight. When Officer Smith reached the next corner, he saw the minivan “sitting in the middle of the road” and three adults and a small child running towards a nearby driveway. Law enforcement officers stopped the three adults and placed them in custody, while Officer Smith returned to the minivan. Officer Smith

STATE v. FERGUSON

[204 N.C. App. 451 (2010)]

noticed a “very strong odor” of marijuana emanating from the vehicle, which he testified “wasn’t the smell of burnt marijuana,” but instead smelled like the “raw smell of unburnt marijuana.”

According to Officer Smith, Defendant was one of the three adults that fled from the minivan. The officers determined that the driver of the van, who was not one of the three adults taken into custody at the scene, was the child’s father. The officers summoned a tracking dog, but were unable to locate the driver. The other two adults in the van were Mario Jerald and Jacob Stressman. Defendant told Officer Smith that Mr. Jerald was her boyfriend, that they lived at the same address, and that she was unemployed. Mr. Jerald, who was also unemployed, had \$1,390 in cash and two cell phones. The third adult, Jacob Stressman, had a “marijuana container” on his keyring.

After the three adults were secured, the officers searched the minivan. Officer Smith testified that, “under the front passenger seat[,] [they] found a black plastic bag containing two bags of marijuana,” one of which weighed 28.5 grams and the other of which weighed 16.8 grams. In the glove compartment, the officers found a smaller bag containing 4.9 grams of marijuana. Officer Smith testified that, based on his training and experience, the fact that the marijuana was divided into three bags suggested that it was intended for sale. Officer Smith also testified that Defendant’s pocketbook contained “a burnt marijuana cigarette weighing .24 grams,” a cell phone, and \$200 in cash. Officer Smith testified that he “[didn’t] recall” anything about “the way [Defendant] seemed or acted.”

On cross-examination, Officer Smith acknowledged that he did not know how long Defendant had been in the minivan before he stopped it and that the officers had lost sight of the vehicle during the chase. When Officer Smith first saw Defendant, she was running away from the minivan, so he did not see her getting in or out of the vehicle. Officer Smith told the jury that, “to the best of [his] knowledge,” Defendant had been a back seat passenger and that he understood that the driver jumped out and ran away while the vehicle was still running. Officer Smith agreed that the occupants of the van were “scared and confused” and had cooperated with the officers. He acknowledged that Defendant gave truthful answers to the officers’ questions about her name and address. Officer Smith also conceded that Defendant was not the driver or owner of the minivan and that she had no connection to the driver’s child. He testified that there was no DNA, fingerprint, or other physical evidence linking Defendant to the bags of marijuana found in the van, that he did not see who put

STATE v. FERGUSON

[204 N.C. App. 451 (2010)]

the marijuana under the car seat, and that he had not seen Defendant making any suspicious gestures. On redirect examination, Officer Smith testified that he had no “opportunity to see anybody stashing anything under a seat or in the glove box.”

Officer Smith was the only witness for the State. At the close of the State’s evidence, Defendant moved to dismiss the charges against her. Although the trial court dismissed the conspiracy to possess marijuana charge, it denied Defendant’s motion with respect to the remaining charges. Defendant did not present any evidence. Following the arguments of counsel and the trial court’s instructions, the jury returned verdicts convicting Defendant of possession of marijuana with intent to sell and deliver, felonious possession of marijuana, possession of drug paraphernalia, and resisting, delaying, and obstructing an officer.

At the sentencing hearing, the trial court determined that Defendant should be sentenced as a Level I offender, consolidated all of Defendant’s convictions for judgment, sentenced Defendant to a minimum of six months and a maximum of eight months imprisonment in the custody of the North Carolina Department of Correction, suspended Defendant’s sentence, and placed Defendant on supervised probation. From this judgment, Defendant noted a timely appeal to this Court.

II. Legal Analysis

A. Admissibility of Drug Identification Testimony

[1] First, Defendant argues that the trial court committed plain error by “allowing opinion testimony that the substance found in the [minivan] and [Defendant’s] pocketbook was marijuana.” At trial, Officer Smith testified without objection that he searched the minivan and found (1) a bag under the front passenger seat that contained two bags of marijuana; (2) a smaller bag of marijuana in the glove compartment; and (3) a burnt marijuana cigarette in Defendant’s pocketbook. On appeal, Defendant acknowledges that she did not object to Officer Smith’s testimony that the items in question contained marijuana at trial and argues, for that reason, that the admission of this testimony constituted plain error. *See* N.C. R. App. P. 10(a)(1) (2009) (stating that, “to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make”). We disagree.

STATE v. FERGUSON

[204 N.C. App. 451 (2010)]

In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4). Since Defendant has assigned as error and argued in her brief that the admission of Officer Smith's testimony identifying the substances found in the bags seized from the minivan and in the cigarette seized from Defendant's pocketbook as marijuana constituted plain error, the prerequisites for plain error review set out in N.C.R. App. P. 10(a)(4) have been met. As a result, the ultimate issue we must confront on appeal is whether admission of Officer Smith's testimony constituted plain error.

"The plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' . . . or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings. . . .'"

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). Thus, we must decide whether the admission of the testimony in question constituted such a "fundamental error" as to "seriously affect the fairness, integrity, or public reputation" of the Defendant's trial.

In *State v. Fletcher*, 92 N.C. App. 50, 56, 373 S.E.2d 681, 685 (1988), this Court addressed the extent to which law enforcement officers were entitled to testify that a particular substance was marijuana. In addressing this issue, the Court first discussed the qualifications of the officers whose testimony was at issue.

At the time of trial, [Officer] Biggerstaff had been a law enforcement officer for almost five years and was a narcotics investigator . . . [with] schooling and on-the-job training in the identification of marijuana. . . . [Captain Townsend] had been a law enforcement officer for sixteen and one-half years and . . . had special training in the identification of drugs.

STATE v. FERGUSON

[204 N.C. App. 451 (2010)]

In concluding that testimony from officers with qualifications similar to those of Officer Biggerstaff and Captain Townsend to the effect that a particular substance was marijuana was admissible, we stated that:

Expert testimony is properly admissible when it “can assist the jury to draw certain inferences from facts because the expert is better qualified” than the jury to form an opinion on the particular subject. . . . “The test for admissibility is whether the jury can receive ‘appreciable help’ from the expert witness.” Here we believe the two officers, because of their study and experience, were better qualified than the jury to form an opinion as to the contents of the clear plastic bag. The jury received “appreciable help” from the expert testimony and was free to consider the opinions in deciding whether they were convinced the substance was marijuana.

Fletcher, 92 N.C. App. at 56-57, 373 S.E.2d at 685-86 (quoting *State v. Bullard*, 312 N.C. 129, 139, 322 S.E.2d 370, 376 (1984), and *State v. Knox*, 78 N.C. App. 493, 495, 337 S.E.2d 154, 156 (1985), and citing N.C. R. Evid. 702).

Although the officers in *Fletcher* testified as experts, our appellate courts have never held that an officer must be tendered as an expert before identifying a particular substance as marijuana. Indeed, in *State v. Moncree*, 188 N.C. App. 221, 655 S.E.2d 464 (2008), this Court held that an SBI agent had testified as an expert witness despite the fact that the State proffered him as a lay witness:

Agent Pintacuda testified regarding his experience in forensic analysis, his employment at various sheriffs departments, and his extensive training in analyzing physical evidence. . . . Agent Pintacuda’s extensive education and training in forensic analysis makes it difficult to imagine how he was able to separate his education, training, and experience while working for the SBI to determine the substance found in defendant’s shoe was marijuana based solely on his lay opinion. Therefore, Agent Pintacuda testified as an expert witness concerning the substance found in defendant’s shoe

Moncree, 188 N.C. App. at 226-27, 655 S.E.2d at 468. Furthermore, if a defendant fails to request that a witness be properly qualified as an expert, “such a finding is deemed implicit in the trial court’s admis-

STATE v. FERGUSON

[204 N.C. App. 451 (2010)]

sion of the challenged testimony.” *State v. Perry*, 69 N.C. App. 477, 481, 317 S.E.2d 428, 432 (1984) (citing *State v. Hunt*, 305 N.C. 238, 243, 287 S.E.2d 818, 821 (1982)). Finally, “since defendant did not object on the grounds that the testifying witnesses were not qualified as experts, he has waived his right to later make the challenge on appeal.” *State v. Aguillo*, 322 N.C. 818, 821-22, 370 S.E.2d 676, 677 (1988).

On appeal, Defendant argues first that the Supreme Court’s decision in *State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009), in which it reversed the decision of this Court in *State v. Llamas-Hernandez*, 189 N.C. App. 640, 659 S.E.2d 79 (2008), on the basis of Judge Steelman’s dissent, controls resolution of the present issue and necessitates the granting of a new trial despite our prior decision in *Fletcher*. In essence, Defendant argues that *Llamas-Hernandez* prohibits reliance on the drug identification approach employed by Officer Smith in this case. Aside from the fact that nothing in Judge Steelman’s dissent in *Llamas-Hernandez* or our subsequent decision in *State v. Ward*, — N.C. —, —, 681 S.E.2d 354, 370 (2009) (stating that “the identification of marijuana is different in both degree and kind from the identification of prescription medications”), casts any doubt on the continued vitality of *Fletcher*, nothing in the plain error jurisprudence of this Court or the Supreme Court suggests that trial judges are required to anticipate changes in law of the type that Defendant contends to have been worked by the Supreme Court’s decision in *Llamas-Hernandez*. Thus, we conclude that Defendant’s first argument is without merit.

Secondly, Defendant contends that, even if the standards enunciated in *Fletcher* still apply, “the facts of this case are distinguishable” in that “Officer Smith was not similarly qualified to the officers in those cases,” he “was [not] offered or accepted as an expert on marijuana identification,” and “there is no evidence that he took the substance out of the plastic bag to identify it” or “opened the blunt to ascertain that leaves characteristic of marijuana were inside.” However, as we have already noted, it is not necessary, in the absence of an objection, for a witness to be formally tendered or accepted as an expert in order for that witness to be allowed to present expert testimony. *Perry*, 69 N.C. App. at 481, 317 S.E.2d at 432 (stating that a finding that a particular witness is an expert is implicit in the trial court’s decision to allow the admission of expert testimony). In addition, the record reflects that Officer Smith had been employed in law enforcement for eight years and had received drug interdiction train-

STATE v. FERGUSON

[204 N.C. App. 451 (2010)]

ing from the State Highway Patrol, the Drug Enforcement Agency, and the Bureau of Alcohol, Tobacco, and Firearms, during which he had received instruction in the identification of marijuana. As a result, the evidence in this case suggests that Officer Smith had at least as much, if not more, training and experience in drug identification than one of the officers whose testimony was held admissible in *Fletcher*. Finally, Defendant's argument concerning the lack of evidence about the extent to which Officer Smith opened the containers in which the marijuana was found and the extent to which he based his opinions on the substances' odor goes to the weight to be given to his testimony rather than its admissibility. *Fletcher*, 92 N.C. at 57, 373 S.E.2d at 686 (stating that absence of chemical testing goes to weight of officer's testimony rather than its admissibility); *State v. Sanderson*, 60 N.C. App. 604, 607, 300 S.E.2d 119 (1983) (stating that any doubts about the certainty with which the witness identified certain plants as marijuana went to weight rather than admissibility of the testimony). As a result, we conclude that the trial court did not err, much less commit plain error, in allowing the admission of Officer Smith's testimony to the effect that the substances found in the bags seized from the minivan and the cigarette found in Defendant's pocketbook were marijuana.

B. Sufficiency of the Evidence

[2] Secondly, Defendant argues that the trial court erred by denying her motion to dismiss the charges of possession of marijuana with the intent to sell or deliver and felonious possession of marijuana on the grounds that the record did not contain sufficient evidence that she actually or constructively possessed the bags seized from the minivan that contained marijuana. We agree.

"When a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine 'whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.'" *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). " 'Substantial evidence' is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *Garcia*, 358 N.C. at 412, 597 S.E.2d at 746 (citing *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003), and *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)).

STATE v. FERGUSON

[204 N.C. App. 451 (2010)]

According to N.C. Gen. Stat. § 90-95(d)(4), possession of more than one and a half ounces of a Schedule VI¹ controlled substance is punishable as a Class I felony. As a result, a conviction for felonious possession of marijuana requires proof “that defendant was in possession of more than one and one-half ounces (or approximately 42 grams) of marijuana.” *State v. Partridge*, 157 N.C. App. 568, 571, 579 S.E.2d 398, 399-400 (2003) (citing *State v. Gooch*, 307 N.C. 253, 256, 297 S.E.2d 599, 601 (1982)). Similarly, N.C. Gen. Stat. § 90-95(a) makes it “unlawful for any person: (1) [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance.” To obtain a conviction for possession of marijuana with the intent to sell or deliver, “the State is required to prove two elements: (1) defendant’s possession of the drug and (2) defendant’s intention to ‘sell or deliver’ the drug.” *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985). Thus, possession of marijuana is an element of both felonious possession of marijuana and possession of marijuana with the intent to sell or deliver.

“Possession of a controlled substance may be actual or constructive. ‘A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use.’” *State v. Steele*, — N.C. App. —, —, 689 S.E.2d 155, 158 (2010) (citing *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987), and quoting *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002)). In this case, the fact that Defendant did not actually possess the bags of marijuana in the minivan is not in dispute. As a result, the only basis upon which the Defendant could have possessed the marijuana in the bags seized from the minivan would be under a constructive possession theory.

“A person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing.” *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (citing *State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 374 (1983)). “Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession.” *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citing *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001)). As a general rule, “mere

1. Marijuana is classified as a Schedule VI controlled substance. N.C. Gen. Stat. § 90-94(1).

STATE v. FERGUSON

[204 N.C. App. 451 (2010)]

proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession.’ ” *State v. Weems*, 31 N.C. App. 569, 570, 230 S.E.2d 193, 194 (1976) (citations omitted). Accordingly, “the mere presence of the defendant in an automobile in which illicit drugs are found does not, without more, constitute sufficient proof of his possession of such drugs.” *Weems*, 31 N.C. App. at 571, 230 S.E.2d at 194.

“Our cases addressing constructive possession have tended to turn on the specific facts presented.” *Miller*, 363 N.C. at 99, 678 S.E.2d at 594. “North Carolina courts have cited a variety of factors that may be used in conjunction with the defendant’s presence near the seized contraband to support a finding of constructive possession.” *State v. Fortney*, — N.C. App. —, —, 687 S.E.2d 518, 523 (2010). “[C]onstructive possession depends on the totality of circumstances in each case,” so that “[n]o single factor controls.” *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986) (citing *State v. Baize*, 71 N.C. App. 521, 323 S.E.2d 36 (1984), *disc. rev. denied*, 313 N.C. 174, 326 S.E.2d 34 (1985)). However, our review of the relevant decisions reveals that the cases finding sufficient proof of constructive possession frequently include evidence of one or more of the following:

First, constructive possession cases often include evidence that the defendant had a specific or unique connection to the place where the drugs were found. *See e.g.*, *State v. Butler*, 356 N.C. 141, 144, 567 S.E.2d 137, 139 (2002) (drugs found in taxicab near defendant’s seat; driver told officers he “cleaned and vacuumed the cab prior to beginning his shift,” that “defendant was his first fare of the morning,” and that “cocaine had not been under the driver’s seat when defendant entered the cab”); *Fortney*, — N.C. App. at —, 687 S.E.2d at 523 (2010) (defendant driving motorcycle; drugs found in bag attached to motorcycle handlebars; bag also held firearm, drug paraphernalia, and cell phone charger that matched defendant’s cell phone); *State v. Baublitz*, 172 N.C. App. 801, 616 S.E.2d 615 (2005) (defendant driver of vehicle where drugs found); *State v. Boyd*, 154 N.C. App. 302, 307, 572 S.E.2d 192, 196 (2002) (State presented evidence that “defendant was the only person who could have placed the drugs where they were found”).

Secondly, many constructive possession cases involve evidence that the defendant behaved suspiciously, made incriminating statements admitting involvement with drugs, or failed to cooperate with law enforcement officers. *See e.g.*, *State v. McNeil*, 359 N.C. 800, 801-02, 617 S.E.2d 271, 272-73 (2005) (defendant acted nervous,

STATE v. FERGUSON

[204 N.C. App. 451 (2010)]

ran from police, and admitted possession of some of the drugs that police found); *Butler*, 356 N.C. at 143, 567 S.E.2d at 139 (officer described defendant as “‘very nervous’ and ‘fidgety’ and noted “defendant was ‘very slow’ to exit the vehicle” and “bent down and reached toward the driver’s seat [where drugs later found] prior to opening the door”); *Steele*, — N.C. App. at —, 689 S.E.2d at 159 (“defendant fled when approached by police”; cocaine found “a few feet from where defendant was apprehended in the woods”; defendant “admitted that the cocaine found was his”); *State v. Turner*, 168 N.C. App. 152, 156, 607 S.E.2d 19, 22 (2005) (defendant “sitting next to a wadded-up blanket beneath which the drugs were concealed” and “appeared agitated”; defendant’s “hands were ‘jumbling’ around ‘nervously’ and defendant and co-defendant “appeared to be passing the [drugs] back and forth underneath the blanket”); *Boyd*, 154 N.C. App. at 307, 572 S.E.2d at 196 (defendant “behaved suspiciously upon being stopped by the police, reaching under the seat of the car, moving about, and making it difficult for the police to search him”).

Finally, constructive possession is often based, at least in part, on other incriminating evidence in addition to the fact that drugs were found near the defendant. *See e.g.*, *McNeil*, 359 N.C. at 801, 617 S.E.2d at 272 (police received complaint about drugs being sold in front of address where defendant was found); *State v. Wiggins*, 185 N.C. App. 376, 388, 648 S.E.2d 865, 873 (2007) (defendant’s motel room visited by “known drug seller and user”); *State v. Martinez*, 150 N.C. App. 364, 371, 562 S.E.2d 914, 918 (2002) (drugs found in trunk of car in which defendant was passenger; witness testified to “planned drug transaction”; driver testified defendant paid him “to be his courier to and from [witness’s] house”; “officers independently corroborated and verified everything that [witness] had reported to them about the drug transaction in process”).

In this case, Officer Smith testified that he saw a minivan exceeding the speed limit, signaled the van to stop, and directed the driver to remain inside. Instead of complying with Officer Smith’s instruction, the driver drove off around a corner out of the officer’s sight. After following the minivan, Officer Smith found it sitting in the middle of a nearby street in drive with the engine running. The driver had fled; efforts to locate him proved unsuccessful. Three adults and a small child were running from the minivan towards a nearby house. The driver was the child’s father; Defendant had no relationship to the child. After law enforcement officers placed the adults in custody, they searched the van. Underneath the front passenger seat, Officer

STATE v. FERGUSON

[204 N.C. App. 451 (2010)]

Smith found a large bag containing two smaller bags of marijuana. In the glove box, Officer Smith found a small bag of marijuana. In Defendant's handbag, Officer Smith found a burned marijuana cigarette weighing .24 grams. Officer Smith understood that Defendant had been a back seat passenger. We conclude that this evidence is insufficient to show Defendant's constructive possession of the marijuana found in the bags seized inside the minivan.

Although "constructive possession depends on the totality of circumstances in each case," *James*, 81 N.C. App. at 93, 344 S.E.2d at 79, so that the presence or absence of evidence of a given circumstance is not dispositive, the record contains no evidence such as that typically found in cases where the evidence has been found sufficient to support a finding of constructive possession. For example, Defendant was neither the owner nor the driver of the van. Thus, there was no evidence that Defendant had a particular connection to the place where the marijuana was found, making this case distinguishable from decisions such as *Miller*, 363 N.C. at 100, 678 S.E.2d at 294 (evidence sufficient to support a finding of constructive possession where defendant was present in a room of the house where two of defendant's children and their mother lived, in which a "rock" of cocaine was in "plain view" on the bed where defendant had been sitting, a bag of cocaine was behind a door within a few feet of where defendant had been sitting, and defendant's state-issued identification card and birth certificate were on a table in the room). Furthermore, there was no evidence that Defendant behaved suspiciously or failed to cooperate with investigating officers after being taken into custody,² unlike the defendant in *State v. Autry*, 101 N.C. App. 245, 399 S.E.2d 357 (1991) (evidence sufficient to support a finding of constructive possession where defendant was present in a room in which a pistol, \$47 in cash, and four packages of cocaine were situated on a table surrounded by four chairs and asked if he could retrieve his jacket from one of the four chairs and get his money). According to Officer Smith, Defendant did what he told her to do and truthfully answered his questions about her identity. Finally, the record contains no evidence that Defendant made any incriminating admissions, had a relationship with the minivan's owner, had a history of selling drugs, or possessed an unusually large

2. Given the driver's decision to flee from the initial traffic stop and to abandon the minivan while it was still in motion and given the fact that Defendant had a marijuana cigarette in her pocketbook, the fact that the remaining passengers, including Defendant, ran from the minivan does not, without more, support an inference that Defendant possessed the marijuana bags seized from the minivan.

STATE v. FERGUSON

[204 N.C. App. 451 (2010)]

amount of cash. Thus, the record lacks any of the facts which usually support a finding of constructive possession.

The State responds to Defendant's challenge to the sufficiency of the evidence to support a finding that she constructively possessed the bags of marijuana found in the minivan by pointing to evidence that the van's driver sped away when law enforcement officers told him to stop, left the car in drive, fled on foot, and abandoned his young child. The State does not, however, cite any authority tending to suggest that the driver's behavior should be utilized to support an inference that Defendant constructively possessed the marijuana in question, particularly given the absence of any evidence tending to show the existence of a relationship between Defendant and the driver. In addition, the State argues that the bag seized from under the front passenger seat was located at the rear of the seat as if it had been put there by a rear seat passenger. However, while the record does contain evidence suggesting that Defendant had been riding in the back seat of the minivan, it is devoid of any indication that she was in a position to put an object in the location where the bag of marijuana was discovered. The State also points to the fact that Defendant was unemployed and had \$200 and a pre-paid cell phone from which numbers could not be traced in her possession; however, the record contains no evidence tending to show a connection between the possession of such pre-paid cell phones and larger quantities of marijuana.³ Furthermore, the State introduced no evidence and cites no authority suggesting that Defendant's possession of \$200.00 while unemployed tends to show that she exercised dominion and control over the bags of marijuana found in the minivan. Finally, the State argues that evidence showed that another passenger, who was identified as Defendant's boyfriend, had a large amount of cash and two cell phones in his possession, but once again fails to explain how this evidence tends to show that Defendant constructively possessed the bags of marijuana found in the minivan. As a result, we do not find any of the arguments advanced by the State in support of the trial court's decision to deny Defendant's dismissal motions persuasive. Thus, we conclude that the State presented insufficient evidence of Defendant's constructive possession of the bags of marijuana in the van.

The decisions of this Court and the Supreme Court fully support our conclusion. For example, in *State v. Richardson*, — N.C.

3. The trial court sustained Defendant's objection to the prosecutorial questions inquiring about the use of cell phones by individuals involved in the drug trade.

STATE v. FERGUSON

[204 N.C. App. 451 (2010)]

App. —, 689 S.E.2d 188 (2010), law enforcement officers executed a search warrant at a private residence in the defendant's neighborhood. When the officers entered the house, defendant and several other men ran out the back door and were apprehended in the back yard. Officers found a "plastic [baggie] containing a 9.4-gram crack rock on the ground near defendant." Although the baggie was "about two feet from defendant's feet," the "other men who had been detained were the same distance from defendant." An officer searched defendant and "found no weapons or contraband" but did find over \$1000.00 in cash in defendant's pocket. Defendant lived in the neighborhood and law enforcement officers had seen him in the vicinity of the house. This Court held that the evidence was insufficient to show Defendant's constructive possession of the cocaine found in the yard and other items seized from the house, noting that "there [were] no indicia of defendant's control over the place where the contraband was found." *Richardson*, — N.C. App. at —, 689 S.E.2d at 191.

Similarly, in *State v. Chavis*, 270 N.C. 306, 154 S.E.2d 340 (1967), law enforcement officers lost sight of the defendant for a few seconds while following him on foot. Shortly thereafter, the officers found drugs in a hat that had been left in a vacant lot through which defendant had walked. The Supreme Court stated that:

The State's case rests primarily upon evidence . . . [that] the hat in and on which the . . . marijuana [was] found was the identical hat defendant was wearing when he . . . passed in front of [the officers]. . . . There is no evidence that either officer observed defendant make any disposition of the hat . . . There was no evidence the marijuana was in a hat while defendant was wearing it. Nor was there evidence the marijuana was put in the hat . . . at defendant's direction. . . . [T]he evidence, in our opinion, falls short of being sufficient to support a finding that the marijuana found by the officers in and on [the] hat . . . was in the possession of defendant when he was first observed and followed by the officers.

Chavis, 270 N.C. at 310-11, 154 S.E.2d at 344.

Finally, in *State v. Acolatse*, 158 N.C. App. 485, 581 S.E.2d 807 (2003), the defendant parked near a car that law enforcement officers had under surveillance. When officers approached defendant, he ran behind the nearest house. An officer pursued defendant, but "lost sight of [him] for approximately ten seconds." Another officer saw defendant make a "throwing motion" towards some bushes, but no

STATE v. FERGUSON

[204 N.C. App. 451 (2010)]

drugs were found there. Defendant was apprehended in the backyard, where cocaine was discovered on the roof of a garage. Defendant was in possession of three cell phones and \$830.00 in cash and his car smelled of cocaine. However, there were no fingerprints on the bags of cocaine and no drugs in defendant's car. This Court held:

[T]he cocaine . . . [was] on the roof of a detached garage in the backyard of a residence. The defendant did not own the residence. . . . The State contends the evidence placing the defendant in close juxtaposition to the cocaine, the money (\$830.00) found on defendant's person . . . and the defendant's throwing motion are sufficient incriminating circumstances from which one can infer constructive possession. We disagree.

. . .

At trial, the State contended the cocaine odor in the defendant's vehicle combined with the belief that during the few seconds the defendant was out of the detectives' view, [he] had enough time to throw the drugs onto the roof was enough to establish possession. However, *Chavis* dictates that this evidence only raises a suspicion of possession. . . . [U]nder our Supreme Court's decision in *Chavis* . . . the State has failed to present any incriminating circumstances from which one can infer constructive possession.

Acolatse, 158 N.C. App. at 488-89, 490, 581 S.E.2d 16 310-11. Thus, these decisions indicate that our conclusion that the State failed to present sufficient evidence that Defendant constructively possessed the bags of marijuana found in the minivan is fully consistent with the prior decisions of this Court and the Supreme Court.

The sole basis for Defendant's argument in support of her dismissal motion at trial and on appeal was that the evidence did not support a finding that she actually or constructively possessed the marijuana found in the bags in the minivan. Since Defendant could not have been convicted of possession of marijuana with the intent to sell or deliver in the absence of a finding that she possessed the marijuana in the bags found in the minivan, both because that was the only marijuana available for sale or delivery to others and because the only evidence tending to show an intent to sell or deliver was Officer Smith's testimony that packaging marijuana in smaller bags indicated an intent to sell or deliver, our determination that the evi-

STATE v. FERGUSON

[204 N.C. App. 451 (2010)]

dence did not support a finding that Defendant possessed the marijuana in these bags requires us to vacate Defendant's conviction for possession of marijuana with the intent to sell or deliver. In addition, attributing the amount of marijuana contained in the bags found under the front passenger seat and in the glove compartment of the minivan was essential to the jury's ability to convict Defendant of felonious possession of marijuana.

However, Defendant has not denied possessing the marijuana cigarette found in her pocketbook. The trial court submitted the issue of Defendant's guilt of simple possession of marijuana in violation of N.C. Gen. Stat. § 90-95(d)(4) to the jury based on this evidence. As a result, we conclude that, given our holding that the evidence was insufficient to support a finding that Defendant possessed the bags of marijuana found in the minivan, we must vacate Defendant's conviction for felonious possession of marijuana and remand this case to the trial court so that Defendant can be resentenced based upon a conviction for violating N.C. Gen. Stat. § 90-95(d)(4). *See Gooch*, 307 N.C. at 258, 297 S.E.2d at 602 (vacating conviction of possession of more than an ounce of marijuana but remanding for resentencing "as upon a verdict of guilty of simple possession of marijuana") (citing *State v. Barnette*, 304 N.C. 447, 468-70, 284 S.E.2d 298, 311 (1981); and *State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979)).

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant's conviction for possession of marijuana with the intent to sell or deliver should be vacated and that her conviction for felonious possession of marijuana should be vacated and the case be remanded for sentencing for simple possession of marijuana in violation of N.C. Gen. Stat. § 90-95(d)(4). In addition, despite the fact that we leave Defendant's convictions for possession of drug paraphernalia and resisting, delaying, and obstructing an officer undisturbed, the fact that the trial court consolidated all of Defendant's convictions for sentencing requires that Defendant's convictions for possession of drug paraphernalia and resisting, delaying, and obstructing an officer be remanded for resentencing as well.

Possession of marijuana with the intent to sell or deliver:
Vacated.

Felonious possession of marijuana: Vacated and remanded for sentencing on simple possession of marijuana.

NELSON v. BENNETT

[204 N.C. App. 467 (2010)]

Possession of drug paraphernalia: Remanded for resentencing.

Resisting, delaying, and obstructing an officer: Remanded for resentencing.

Chief Judge MARTIN and Judge ROBERT C. HUNTER concur.

CHARLENE NELSON, EXECUTRIX OF THE ESTATE OF LUCILLE VIRGINIA JONES,
PLAINTIFF V. GERRY BENNETT, INEZ HAGAMAN, LYNDIA FREJLACH, BRIAN
EANES, STACEY EANES ANGSTADT, WILLIAM HOLT, AND DELORES HOLT,
DEFENDANTS

No. COA09-896

(Filed 15 June 2010)

1. Appeal and Error— interlocutory order and appeal—Rule 54(b) certification

Although the trial court's order did not resolve all of the issues raised by an estate's request for declaratory relief, the Court of Appeals had jurisdiction based on the trial court's certification of this case for immediate appellate review under N.C.G.S. § 1A-1, Rule 54(b).

2. Wills— declaratory judgment—life estate—termination upon occurrence of one or more events

The trial court erred in a declaratory judgment action by construing Item II.B.6 of decedent's will to provide that Ms. Frejlach's life estate terminated if she used the pertinent house or property for business purposes, as a bed and breakfast, or if she leased the house or property. However, the trial court did not err by concluding that Ms. Frejlach's life estate was subject to termination in the event that she did not reside in the house or ceased to reside in the house on the property.

Judge ROBERT N. HUNTER, JR., concurring in part and dissenting in part.

Appeal by Defendant Lynda Frejlach from order entered 31 March 2009 by Judge Allen Baddour in Chatham County Superior Court. Heard in the Court of Appeals 19 November 2009.

NELSON v. BENNETT

[204 N.C. App. 467 (2010)]

Law Office of Michael W. Patrick, by Michael W. Patrick, for defendant-appellant Lynda Frejlach.

Burns, Day & Presnell, P.A., by Lacy M. Presnell, III, and James J. Mills, for defendant-appellee Inez Hagaman.

ERVIN, Judge.

Defendant Lynda Frejlach appeals from an order entered by the trial court construing the will of Lucille Virginia Jones to provide that Ms. Jones' will granted Ms. Frejlach a life estate in a house and eleven acres of real property located in Chatham County that was terminable upon the occurrence of certain triggering events. After careful consideration of the arguments advanced in the parties' briefs in light of the record and the applicable law, we affirm in part and reverse in part.

I. Factual Background

A. Substantive Facts

Ms. Jones died testate on 18 February 2008. Her last will and testament was dated 2 September 1998. Prior to her death, Ms. Jones owned a house and eleven acres of land located at 493 Gardner Road in Apex, North Carolina. Ms. Frejlach lived in the Gardner Road residence with Ms. Jones and assisted Ms. Jones with the design and construction of the Gardner Road residence. Ms. Frejlach alleges that, during this interval, she acquired numerous items of personal property which she stored at the Gardner Road residence based on her understanding that she would inherit the house at some point in the future. In addition, Ms. Frejlach asserts that Ms. Jones told her on numerous occasions that the residence would be left to her following Ms. Jones' death. In approximately 1997 or 1998, Ms. Frejlach left the Gardner Road residence and moved to Illinois.

After her death, Ms. Jones' will was admitted to probate. Item II. B.6 of Ms. Jones' will provided that:

I give the right for life to Lynda Frejlach to live in the house located on the 11 acres of property I own at 493 Gardner Road, Apex, NC, 27502. At her death or if Lynda Frejlach declines to exercise this right, I give this 11 acres of property to my sister, Inez [Hagaman]. This right is only for Lynda Frejlach to live in the house. The house is not to be used for a business or Bed and Breakfast and is not to be leased out by Lynda Frejlach. As indicated earlier, the personal property within the house which I cur-

NELSON v. BENNETT

[204 N.C. App. 467 (2010)]

rently own will belong to my sister, Inez [Hagaman], and should not be sold or disposed of by Lynda Frejlach.

As of 27 October 2008, Ms. Frejlach had not occupied the Gardner Road residence. According to Ms. Frejlach, the Gardner Road residence was in “a state of extreme clutter and disorder” at the time of Ms. Jones’ death, a situation which made it difficult for Ms. Frejlach to locate and remove all of the items of her personal property which she left in the house at the time of her departure for Illinois and which rendered the house “not fit to live in at present.” In addition, Ms. Frejlach contended that she “could not occupy the Gardner Road residence until many items of [Ms. Jones’] personal property—to which [she] has no claim—are removed from the residence.”

B. Procedural Facts

On 27 October 2008, Charlene Nelson, as Executrix of Ms. Jones’ estate, filed a declaratory judgment action in the Superior Court of Chatham County against Gerry Bennett, Ms. Hagaman, Ms. Frejlach, Brian Eanes, Stacey Eanes Angstadt, William Holt, and Delores Holt seeking, among other things, a determination of whether Ms. Frejlach had a license, rather than a life estate, in the Gardner Road property and whether Ms. Frejlach had implicitly renounced her right to live there. On 24 December 2008, Ms. Frejlach filed an answer and cross-claim in which she asked the court to declare that Ms. Jones’ will had granted her a life estate in the Gardner Road property and that she had not renounced her interest in the property in question. On 23 January 2009, Ms. Hagaman filed an answer in which she asserted that Ms. Jones’ will devised a defeasible life estate in the Gardner Road property to Ms. Frejlach and that Ms. Frejlach had declined to accept this life estate, effectively making Ms. Hagaman the owner of the Gardner Road property.

On 26 March 2009, the trial court entered an order interpreting Ms. Jones’ will to devise Ms. Frejlach a defeasible life estate in the Gardner Road property, with this life estate terminable in the event that Ms. Frejlach (1) expressly declined the life estate in writing;¹ (2)

1. On 24 February 2009, Ms. Frejlach filed a formal written acceptance of the life estate, while “respectfully request[ing] the Executor of the Estate to notify the undersigned when the personal property of [Ms.] Jones that has been left to other persons has been removed from that residence so that the residence is liveable and could be occupied by” Ms. Frejlach. As a result, any issue that may have otherwise arisen from the trial court’s conclusion that Ms. Frejlach’s tenancy would terminate in the event that she “decline[d] the life estate expressly in writing” is moot and need not be addressed on appeal.

NELSON v. BENNETT

[204 N.C. App. 467 (2010)]

failed to reside in the Gardner Road residence beginning on or before 27 April 2009; (3) used the Gardner Road house or property for business purposes or as a bed and breakfast inn; (4) leased the house or property; or (5) ceased to reside in the Gardner Road residence. In its order, the trial court certified the issue of the proper interpretation of Item II.B.6 of Ms. Jones' will for immediate appellate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). Ms. Frejlach gave notice of appeal to this Court from the trial court's order on 27 April 2009.

II. Legal AnalysisA. Jurisdiction

[1] The trial court's order did not resolve all of the issues raised by the estate's request for declaratory relief and is, for that reason, not a final decision. The Court of Appeals has jurisdiction over appeals from orders that represent a final judgment as to one or more, but not all, of the claims or parties involved in a particular civil action and the trial court certifies, as it has done in this instance, that there is no just reason for delay. N.C. Gen. Stat. § 1A-1, Rule 54(b); see *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 507 S.E.2d 56 (1998). The trial court's order finally disposes of the claims involving Ms. Frejlach's interest in the Gardner Road property. As a result, this Court has jurisdiction over Ms. Frejlach's challenge to the trial court's order.

B. Standard of Review

"The Declaratory Judgment Act, [N.C. Gen. Stat. §] 1-253 *et seq.*, affords an appropriate procedure for alleviating uncertainty in the interpretation of written instruments. . . ." *Hejl v. Hood, Hargett & Associates, Inc.*, — N.C. App. —, —, 674 S.E.2d 425, 427 (2009) (citation omitted). "The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal." *Cross v. Capital Transaction Grp., Inc.*, 191 N.C. App. 115, 117, 661 S.E.2d 778, 780 (2008) (citation omitted), *disc. review denied*, 363 N.C. 124, 672 S.E.2d 687 (2009). "However, the trial court's conclusions of law are reviewable *de novo*." *Id.* (quoting *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000)). As a result of the fact that there are no factual disputes between the parties, the ultimate issue that we must resolve is the appropriate construction of Item II.B.6 of Ms. Jones' will.

NELSON v. BENNETT

[204 N.C. App. 467 (2010)]

C. Construction of Ms. Jones' Will

[2] “An estate in fee simple determinable is created by a limitation in a fee simple conveyance which provides that the estate shall automatically expire upon the occurrence of a certain subsequent event.” *Station Assoc., Inc. v. Dare County*, 350 N.C. 367, 370, 513 S.E.2d 789, 792 (1999) (citing *Elmore v. Austin*, 232 N.C. 13, 20-21, 59 S.E.2d 205, 211 (1950)). “Like a fee, a life estate may be defeasible if its continued existence is conditional.” *Brinkley v. Day*, 88 N.C. App. 101, 106, 362 S.E.2d 587, 590 (1987) (citing *Blackwood v. Blackwood*, 237 N.C. 726, 76 S.E.2d 122 (1953)). “The law does not favor a construction of the language in a deed which will constitute a condition subsequent unless the intention of the parties to create such a restriction upon the title is clearly manifested.” *Washington City Board of Education v. Edgerton*, 244 N.C. 576, 578, 94 S.E.2d 661, 664, (1956). For that reason, the Supreme Court “has declined to recognize reversionary interests in deeds that do not contain express and unambiguous language of reversion or termination upon condition broken” and has “stated repeatedly that a mere expression of the purpose for which the property is to be used without provision for forfeiture or reentry is insufficient to create an estate on condition . . .” *Station Assoc.*, 350 N.C. at 370, 371, 513 S.E.2d at 792, 793. However, “in those cases in which the deed contained express and unambiguous language of reversion or termination, we have construed a deed to convey a determinable fee or fee on condition subsequent.” *Id.*, 350 N.C. at 371-72, 513 S.E.2d at 793. “The language of termination necessary to create a fee simple determinable need not conform to any ‘set formula’ ” as long as “ ‘any words expressive of the grantor’s intent that the estate shall terminate on the occurrence of the event’ or that ‘on the cessation of [a specified] use, the estate shall end,’ ” are used. *Id.*, 350 N.C. at 373-74, 513 S.E.2d at 794 (quoting *Lackey v. Hamlet City Board of Education*, 258 N.C. 460, 464, 128 S.E.2d 806, 809 (1963), and *Charlotte Park and Recreation Commission v. Barringer*, 242 N.C. 311, 317, 88 S.E.2d 114, 120 (1955), *cert. denied sub nom.*, 350 U.S. 983, 100 L. Ed. 851 (1956)). As a result, the fundamental question that we must resolve in construing Item II.B.6 of Ms. Jones’ will is determining whether it clearly expresses an intent that the life estate granted to Ms. Frejlach would automatically terminate upon the occurrence of one or more of the events described there.

It is an elementary rule . . . that the intention of the testat[rix] is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates

NELSON v. BENNETT

[204 N.C. App. 467 (2010)]

some rule of law, or is contrary to public policy. In determining the testat[rix]'s intention, the primary source is the language used by the testat[rix]. Isolated clauses are not to be considered out of context, but rather the entire will is to be examined as a whole so as to ascertain the general plan of the testat[rix].

Edmunds v. Edmunds, 194 N.C. App. 425, 433 669 S.E.2d 874, 879 (2008), *aff'd per curiam*, 363 N.C. 740, 686 S.E.2d 150 (2009) (quoting *Pittman v. Thomas*, 307 N.C. 485, 492, 299 S.E.2d 207, 211 (1983) (internal quotations omitted)). “The intent of the testat[rix] must be gathered from the four corners of the will and the circumstances attending its execution.” *Ward v. Ward*, 88 N.C. App. 267, 269, 362 S.E.2d 847, 849 (1987), *disc. review denied*, 322 N.C. 115, 367 S.E.2d 921 (1988) (citation omitted). When interpreting a will, “every word and clause must, if possible, be given effect and apparent conflicts reconciled.” *Slater v. Lineberry*, 89 N.C. App. 558, 559, 366 S.E.2d 608, 610 (1988).

A careful analysis of the language of Item II.B.6 of Ms. Jones' will discloses that those portions of the will providing that “[t]he house is not to be used for a business or Bed and Breakfast and is not to be leased out by [Ms.] Frejlach” are unaccompanied by any “express and unambiguous language of reversion or termination upon condition broken,” *Station Assoc.*, 350 N.C. at 370, 513 S.E.2d at 793, and amount to “a mere expression of the purpose for which the property is to be used without provision for forfeiture or reentry.” *Id.* at 371, 513 S.E.2d at 793. We are particularly persuaded of the correctness of this conclusion given the Supreme Court's clear statement that the creation of defeasible interests is disfavored.² As a result, we conclude that the trial court erred by construing Item II.B.6 to provide that Ms. Frejlach's life estate³ terminates if she “uses the house or

2. Although Ms. Hagaman argues that what we agree is clearly reversionary language applicable to that portion of Item II.B.6 of Ms. Jones' will requiring Ms. Frejlach to live on the Gardner Road property should be deemed applicable to the provisions of Item II.B.6 concerning the leasing and business-related use of the property, we are simply not persuaded by that argument. The only portion of Item II.B.6 to which the reversionary language in question appears to relate is the language which requires Ms. Frejlach to live on the property, and we believe that it would be inconsistent with the Supreme Court's insistence that such language be “express and unambiguous,” *Station Assoc.*, 350 N.C. at 370, 513 S.E.2d at 792, for the Court to treat that reversionary language as applicable throughout Item II.B.6.

3. Although one of the questions about which Ms. Jones' estate originally sought the trial court's guidance was whether Item II.B.6 of Ms. Jones' will granted Ms. Frejlach a license or a life estate, no party to this appeal has challenged the trial court's determination that the relevant provision of Ms. Jones' will granted Ms. Frejlach a life estate in the Gardner Road property.

NELSON v. BENNETT

[204 N.C. App. 467 (2010)]

property for business purposes or as a bed and breakfast” or if she “leases the house or property.”

On the other hand, the language providing that Ms. Jones “give[s] the right for life to [Ms.] Frejlach to live in the house” located on Gardner Road and that, “if [Ms.] Frejlach declines to exercise this right, I give this 11 acres of property to” Ms. Hagaman is not merely precatory.⁴ We are unable to understand the “right” to be “exercised” as anything other than Ms. Frejlach’s right to live on the Gardner Road property. Although this portion of Item II.B.6 lacks some of the language that is frequently found in instruments creating defeasible interests, such as “so long as” or “on the condition that,” the relevant provisions of Item II.B.6 do clearly state that, in the event that Ms. Frejlach does not “exercise this right” to live on the property, it goes to Ms. Hagaman. As a result, we are unable to avoid the conclusion that Item II.B.6 of Ms. Jones’ will does grant Ms. Frejlach a life estate in the Gardner Road property that is subject to termination in the event that she chooses not to live there.

Our dissenting colleague rejects this reading of Item II.B.6 of Ms. Jones’ will on the grounds that, “[r]eading the devise in the sequence transcribed by the testatrix, it appears that Ms. Jones’ intent was merely to devise appellant Frejlach a life estate in which the testatrix desired her to live in the house” and that, “[a]t best, the devise to appellant in item II, paragraph (B)(6) would be defeasible only upon appellant Frejlach’s death or her declining to exercise her right to the devised property, at which point the property would vest in appellee Hagaman.” As a result, the dissent concludes that “this language would essentially create a ‘plain vanilla’ life estate, because any life estate devised is only defeasible upon the death of the life tenant or upon a devisee’s decision to renounce the estate.”⁵ We are not per-

4. The dissent claims to be unable to distinguish between the language used with respect to the portions of Item II.B.6 relating to the use of the Gardner Road property as a business or a bed and breakfast or the leasing of the Gardner Road property, on the one hand, and the portion of Item II.B.6 relating to the requirement that Ms. Frejlach live on the Gardner Road property, on the other. However, as we have already noted, there is no language such as the provision that the Gardner Road property will be given to Ms. Hagaman in the event that Ms. Frejlach dies or “declines to exercise this right” in that portion of Item II.B.6 relating to the leasing of the property or its use for business or bed and breakfast purposes. Thus, contrary to the argument advanced in the dissent, we believe that the language used in Item II.B.6 with respect to the requirement that Ms. Frejlach live on the Gardner Road property is, in fact, different from the language that we have concluded is, in fact, precatory in nature.

5. In reaching this conclusion, the dissent equates a failure to exercise the right to live on the property with a formal renunciation of the interest granted by Item II.B.6

NELSON v. BENNETT

[204 N.C. App. 467 (2010)]

suaed by this logic because it fails to give sufficient effect to Ms. Jones' very specific and repeated use of the word "live." As used in this context, "live" means "to make one's dwelling; reside." *Webster's New World Dictionary of the American Language*, 857 (1957). We believe that, under the canons of construction discussed above, we must assume that Ms. Jones chose her words carefully and intended to use the language that she used. In the event that one accepts the logic of our dissenting colleague, Ms. Frejlach could retain a life estate in the Gardner Road property without ever setting foot on the premises, a result which we have difficulty squaring with Ms. Jones' explicit statement that she gave Ms. Frejlach the right "to live in the house" located on Gardner Road "for life" and that, if Ms. Frejlach "declines to exercise this right, I give this 11 acres of property to" Ms. Hagaman.⁶ Thus, since the logic adopted by our dissenting colleague does not give effect to what we believe to be Ms. Jones' clear intention to divest Ms. Frejlach of her life estate in the event that she failed to live on the Gardner Road property, we do not find the approach taken in the dissent persuasive.⁷

of Ms. Jones will of the type contemplated in N.C. Gen. Stat. § 31B-2. The dissent does not provide any justification for treating a failure to "exercise this right" and a formal renunciation as one and the same thing. After a careful study of Item II.B.6, we believe that the reference to "declin[ing] to exercise this right" should be understood as a reference to a failure on Ms. Frejlach's part to live on the Gardner Road property rather than to a formal renunciation of the life estate, with this conclusion based on the fact that the language of Item II.B.6 makes no reference to a formal renunciation and the fact that the relevant language indicates a clear intent on the part of Ms. Jones that Ms. Frejlach actually occupy the property. Furthermore, as long as any business or bed and breakfast use that Ms. Frejlach might make of the property or any lease that Ms. Frejlach might enter into with respect to the property does not prevent her from living there, such activities would not, as we read Item II.B.6, operate to terminate her interest in the Gardner Road property.

6. The dissent argues that it is not clear what Ms. Frejlach would have to do in order to comply with the requirement that she "live" on the Gardner Road property and that this lack of clarity militates against a reading of Item II.B.6 that would require her to live on the property at the risk of losing her interest. Although we recognize that issues of fact might arise in the future as the result of Ms. Jones' choice of language, we do not believe that the potential that such issues might arise, in and of itself, introduces such uncertainty into Ms. Frejlach's life estate as to defeat the creation of a defeasible interest under the logic of *Brinn v. Brinn* 213 N.C. 282, 287, 195 S.E. 793, 796 (1938).

7. It is not clear to the Court whether Ms. Frejlach sought or obtained a stay of that portion of the trial court's order requiring her to take up residence on the Gardner Road property on or before 27 April 2009. We do not, however, believe that we need to concern ourselves with the appropriateness of the trial court's determination that Ms. Frejlach must occupy the Gardner Road residence by that date, since Ms. Frejlach has not assigned that portion of the trial court's order as error on appeal. N.C.R. App. P. 10(a).

NELSON v. BENNETT

[204 N.C. App. 467 (2010)]

Thus, for the reasons set forth above, we conclude that the trial court erred by finding that Item II.B.6 of Ms. Jones' will gave Ms. Frejlach a life estate in the Gardner Road property that terminated in the event that she "use[d] the house or property for business purposes or as a bed and breakfast" or if she "lease[d] the house or property." On the other hand, we conclude that the trial court correctly determined that Ms. Frejlach's life estate was subject to termination in the event that she did not "reside in the house" or "cease[d] to reside in the house on the property" As a result, for the reasons set forth above, the trial court's order is affirmed in part and reversed in part.

AFFIRMED IN PART AND REVERSED IN PART.

Judge STROUD concurs.

Judge ROBERT N. HUNTER, JR., concurs in part and dissents in part in separate opinion.

HUNTER, JR., Robert N., Judge, concurring in part and dissenting in part.

Although I agree with my colleagues that the language suggesting that Ms. Frejlach may not use the home as a business is precatory, our opinions differ with regard to whether Ms. Frejlach is required to live in the devised home as a condition subsequent. After reviewing the language of Item II(B)(6), I do not find a significant distinction between the language of desire that Ms. Frejlach not use the home as a business and the language desiring that Ms. Frejlach live on the premises. The majority opinion does not provide such a distinction.

For instance, the pertinent language in dispute provides: "I give the right for life to Lynda Frejlach to live in the house located on the 11 acres of property I own At her death or if Lynda Frejlach declines to exercise this right, I give this 11 acres of property to my sister, Inez Hageman." This devise does not contain definite language of reversion or re-entry based on a condition that Ms. Frejlach live in the home, but rather provides for clear and definite events of defeasance *only* in the event of death or renunciation. With regard to this language, N.C. Gen. Stat. § 31B-2 (2009) provides a methodology for renouncing or declining a devise, and the death of the tenant always results in the end of a life estate. Thus, the testator's own words would lose their meaning if the majority's interpretation of the will is employed.

NELSON v. BENNETT

[204 N.C. App. 467 (2010)]

When interpreting a will, “every word and clause must, if possible, be given effect and apparent conflicts reconciled.” *Slater v. Lineberry*, 89 N.C. App. 558, 559, 366 S.E.2d 608, 610 (1988). It has been long held that “[o]rdinarily a clause in [an instrument] will not be construed as a condition subsequent, unless it contains language sufficient to qualify the estate conveyed and provides that in case of a breach the estate will be defeated, and this must appear in appropriate language sufficiently clear to indicate that this was the intent of the parties.’” *Station Assoc. Inc. v. Dare County*, 350 N.C. 367, 370, 513 S.E.2d 789, 792 (1999) (quoting *Ange v. Ange*, 235 N.C. 506, 508, 71 S.E.2d 19, 20 (1952); see also *Church v. Refining Co.*, 200 N.C. 469, 473, 157 S.E. 438, 440 (1931); *Braddy v. Elliott*, 146 N.C. 578, 580-81, 60 S.E. 507, 508 (1908).

A condition subsequent will not be recognized unless the language of the instrument contains “express and unambiguous language of reversion or termination upon condition broken.” *Station Assoc.*, 350 N.C. at 370, 513 S.E.2d at 792. In *Station Assoc.*, the Court notes a plethora of cases which support the aforementioned proposition:

Washington City, 244 N.C. at 577, 578, 94 S.E.2d at 662, 663 (habendum clause contained expression of intended purpose—“for school purposes”; held fee simple because no power of termination or right of reentry was expressed); *Ange*, 235 N.C. at 508, 71 S.E.2d at 20 (habendum clause contained the language “for church purposes only”; nevertheless held to be an indefeasible fee since there was “no language which provides for a reversion of the property to the grantors or any other person in case it ceases to be used as church property”); *Shaw Univ. v. Durham Life Ins. Co.*, 230 N.C. 526, 529-30, 53 S.E.2d 656, 658 (1949) (property and the proceeds therefrom were to be “perpetually devoted to educational purposes”; held fee simple absolute since there was “nothing in the . . . deed to indicate the grantor intended to convey a conditional estate,” and there was “no clause of re-entry, no limitation over or other provision which was to become effective upon condition broken”); *Lassiter v. Jones*, 215 N.C. 298, 300-01, 1 S.E.2d 845, 846 (1939) (deed conveyed property “for the exclusive use of the Polenta Male and Female Academy; it shall be used exclusively for school purposes”; held to have conveyed a fee simple “for the reason that nowhere in the deed is there a reverter or reentry clause”); *First Presbyterian*, 200 N.C. at 470-71, 473, 157 S.E. at 438-39, 440

NELSON v. BENNETT

[204 N.C. App. 467 (2010)]

(habendum clause indicated that the property was to be used for church purposes only; held to be an indefeasible fee simple, notwithstanding the language in the habendum clause, since there was “no language showing an intent that the property shall revert to the grantor . . . or that the grantor . . . shall have the right to reenter.”); *Hall v. Quinn*, 190 N.C. 326, 328-29, 130 S.E. 18, 19-20 (1925) (granting clause and habendum clause both indicated that the property was “to be used for the purposes of education” only; held to be an estate in fee simple because there was “no clause of re-entry; no forfeiture of the estate upon condition broken”); *Braddy*, 146 N.C. at 580-81, 60 S.E. at 508 (recitals that the grantor was to improve the property did not create an estate upon condition since there was an absence of an express reservation in the deed of a right of reentry).

Id. at 370-71, 513 S.E.2d at 792-93. On the other hand, the Court also provided that an estate has been recognized by courts as defeasible or subject to condition subsequent where the habendum clause “contain[s] express and unambiguous language of reversion or termination” *Id.* at 371, 513 S.E.2d at 793. The following cases were recognized by the Court in support:

Mattox v. State, 280 N.C. 471, 472, 186 S.E.2d 378, 380 (1972) (habendum clause contained condition that if the grantee failed to continuously and perpetually use the property as a Highway Patrol Radio Station and Patrol Headquarters, the land “shall revert to, and title shall vest in the Grantor”); *City of Charlotte v. Charlotte Park & Rec. Comm’n*, 278 N.C. 26, 28, 178 S.E.2d 601, 603 (1971) (habendum clause contained language that “upon condition that whenever the said property shall cease to be used as a park . . . , then the same shall revert to the party of the first part”); *Lackey v. Hamlet City Bd. of Educ.*, 258 N.C. 460, 461, 128 S.E.2d 806, 807 (1963) (deed contained paragraph providing, “It is also made a part of this deed that in the event of the school’s disabandonment (failure) . . . this lot of land shall revert to the original owners”); *Charlotte Park & Rec. Comm’n v. Barringer*, 242 N.C. 311, 313, 88 S.E.2d 114, 117 (1955) (deed indicated that in the event the lands were not used solely for parks and playgrounds, the “said lands shall revert in fee simple to the undersigned donors”), *cert. denied*, 350 U.S. 983, 100 L. Ed. 851 (1956); *Pugh v. Allen*, 179 N.C. 307, 308, 102 S.E. 394, 394 (1920) (deed contained provision that “in case the said James H. Pugh should die without an heir the following gift shall revert to the sole use and

NELSON v. BENNETT

[204 N.C. App. 467 (2010)]

benefit of my son”); *Smith v. Parks*, 176 N.C. 406, 407, 97 S.E. 209, 209 (1918) (deed indicated that “should [grantor] die without leaving such heir or heirs, then the same is to revert back to her nearest kin”); *Methodist Protestant Church of Henderson v. Young*, 130 N.C. 8, 8-9, 40 S.E. 691, 691 (1902) (deed expressed that if the church shall “discontinue the occupancy of said lot in manner as aforesaid, then this deed shall be null and void and the said lot or parcel of ground shall revert to [the grantor]”).

Id. at 372, 513 S.E.2d at 793.

Applying the aforementioned case law to the present case, the testatrix’s use of the words “live in the house” and the statement that the house is not to be used for certain purposes are not clear expressions that the property shall revert to the grantor or that the estate will automatically terminate upon the happening of those stated events. Standing alone these provisions are “precatory”⁸ and therefore not recognized as valid to create conditions subsequent by our Court, and considered mere surplusage, without effect. *See id.* at 370, 513 S.E.2d at 792-93.

The problem presented by precatory words is not new and has been employed in an endless variety of legal disputes. *Brinn v. Brinn*, 213 N.C. 282, 287, 195 S.E. 793, 796 (1938) suggests the following method of analysis:

Where, however, a limited estate is devised to the first taker, words of recommendation, request, entreaty, wish, or expectation addressed to the legatee or devisee will ordinarily make the first taker a trustee for the person or persons in whose favor such expressions are used, provided the testator has pointed out with sufficient clearness and certainty both the subject matter and the objects of the intended trust. Such words of recommendation or request when used in direct reference to the estate are held to be *prima facie* testamentary and imperative and not precatory. When accompanying a limited gift or bequest, words of request or desire or recommendation that a particular application be made of such bequest will be deemed to impose a trust upon these conditions: (a) That they are so used to exclude all option or discretion in the party who is to act, as to his acting according to them

8. Precatory words are those which express a request or wish rather than a positive command. In the absence of a contrary intention manifested by the testator in the will, precatory words will not be made imperative. 1 WIGGINS, WILLS AND ADMINISTRATION OF ESTATES IN NORTH CAROLINA § 12.6 (4th ed. 2005).

NELSON v. BENNETT

[204 N.C. App. 467 (2010)]

or not; (b) the subject is certain; and (c) the objects expressed are not too vague or indefinite to be enforced. This is particularly true when those in behalf of whom the requests are made are natural objects of the bounty of the testator and no other disposition of the remainder of the estate after the limited estate is made.

Id. (citations omitted).

Using this analysis, a directive that the life tenant must “live” on the property is simply too vague and indefinite to be enforced. When does someone “live” on the property. Must it be her domicile? Must she register to vote there? Can she “live” in more than one place at the same time? If she lists the property for taxes or cuts standing timber, is she living on the property? The majority’s decision would seem to allow Ms. Frejlach the ability to rent the property or use it for a business and that these terms would not cause a reversion. In my opinion, the drafter of the will and the testatrix intended “living” and the incidents of “life estate” as identical in meaning and effect.

As the law does not favor restrictions on the title to land unless clearly manifested in the instrument, pursuant to long held precedent, this language should be construed to provide that Inez Hagaman has a remainder, fee simple absolute interest in the home at Ms. Frejlach’s death or if Ms. Frejlach declines to accept the devise, at which point her interest in the home would lapse and vest in Ms. Hagaman. *See Board of Education v. Edgerton*, 244 N.C. 576, 94 S.E.2d 661, 664 (1956) (stating that the law does not favor restrictions on the title to land; therefore, the intention of the party to create a condition subsequent must be clearly manifested through the language of the instrument).

Finally, our Courts presume that the person drafting the will, whether an attorney or layman, knows the law and will apply the law correctly while drafting the will. *Austin v. Austin*, 160 N.C. 367, 368, 76 S.E. 272, 272 (1912). This will was clearly drafted by an attorney who would know how to draft a will with a reversionary clause in it.

Reading the devise in the sequence transcribed by the testatrix, it appears that Ms. Jones’s intent was merely to devise appellant Frejlach a life estate in which the testatrix desired her to live in the house. At best, the devise to appellant in Item II, paragraph (B)(6) would be defeasible only upon appellant Frejlach’s death or her declining to exercise her right to the devised property, at which point the property would vest in appellee Hagaman. As such, this language

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

would essentially create a “plain vanilla” life estate, because any life estate devised is only defeasible upon the death of the life tenant or upon a devisee’s decision to renounce the estate. *See* N.C. Gen. Stat. § 31B-1 (2009).

The trial court’s order and the majority opinion, in lieu of declaring the rights of the parties, has the legal effect of creating right of entry language based on precatory conditions. A right of entry or reversionary language must be shown by the testator’s language in the document and cannot be inferred by the court when interpreting the document. As there is no express and unambiguous language of reversion or termination upon the breach of the stated conditions, I would reverse the trial court and hold that Ms. Jones’s will devised appellant Frejlach a life estate, and therefore I dissent from the majority opinion on this issue.

R.T. HUDGINS, PLAINTIFF V. G.W. WAGONER, JR., AND W.K.S. CORPORATION,
DEFENDANTS

No. COA08-1004

(Filed 15 June 2010)

1. Statutes of Limitation and Repose—fraud—reasonable diligence

In a fraud action involving activities by real estate partners in which the statute of limitations was raised, the trial court correctly denied defendant’s motion for JNOV and allowed the jury to determine whether plaintiff exercised reasonable diligence to discover defendants’ activities.

2. Fraud—pleading—misrepresentation—sufficiently particular

Plaintiff’s complaint alleging fraud between real estate partners was sufficiently particular where plaintiff alleged that a misrepresentation was made during a conversation and that defendants purchased and hid property from plaintiff, entitling him to compensatory and punitive damages.

3. Fraud—misrepresentation—evidence—not overly vague

Plaintiff’s evidence of a false representation was not too vague to support a claim of fraud between real estate partners

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

where defendant Wagoner told plaintiff that he would be informed if they were going to extend the option or do anything else on the property.

4. Fraud— intent to deceive—evidence—more than scintilla

There was more than a scintilla of evidence in a fraud action from which the jury reasonably could have concluded that defendant Wagoner intended to deceive plaintiff and had no intention of complying with his statement that he would let plaintiff know if they were going to extend an option or do anything else on a property.

5. Fraud— reasonable reliance—defendant's statement—plaintiff's action

A jury could have found reasonable reliance by plaintiff on defendant's statement in a fraud action involving real estate partners where plaintiff regularly searched Multiple Listing Service reports after defendant Wagoner told him that he would be informed if anything was done with the property.

6. Damages and Remedies— fraud—real estate partners—profits

There was sufficient evidence to determine damages in a fraud action between real estate partners where the jury heard evidence from both parties about defendants' profits. Furthermore, the amount of damages was neither excessive nor contrary to law.

7. Damages and Remedies— fraud—punitive damages—JNOV denied

The denial of defendants' motion for a JNOV in a fraud action on the issue of punitive damages was reversed and the matter was remanded where there was no written opinion stating the trial court's reasons for upholding the final award.

8. Civil Procedure— motion for new trial—allegation untimely plead

The trial court did not err in a fraud action by denying defendants' motion for a new trial based on plaintiff's untimely identification of an alleged misrepresentation that purportedly had not been pled with sufficient particularity.

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

9. Evidence— prior bad conduct—civil fraud—unrelated felony

The trial court did not err in a fraud action by allowing the jury to hear testimony concerning an unrelated felony to which defendant Wagoner had pled guilty. The only information the jury heard was that Wagoner had lost his real estate broker's license; all information about the felony was discussed outside the presence of the jury.

10. Trials— closing argument—attorney's belief—no intervention ex mero motu

The trial did not abuse its discretion in a fraud action by not intervening *ex mero motu* in plaintiff's closing argument. The argument included statements that could be construed as the attorney's personal belief that defendant Wagoner was lying, but did not actually say that the Wagoner was lying.

Appeal by defendants from orders and judgment entered 27 February 2008 by Judge Paul C. Ridgeway in Alamance County Superior Court. Heard in the Court of Appeals 11 February 2009.

Benson & Brown, PLLC, by Drew Brown, for plaintiff-appellee.

Smith Moore Leatherwood, LLP, by James G. Exum, Jr., Bruce P. Ashley, and Stephen M. Russell, Jr., for defendants-appellants.

JACKSON, Judge.

The W.K.S. Corporation ("WKS") and its president, G.W. Wagoner, Jr. ("Wagoner") (collectively, "defendants"), appeal the 27 February 2008 orders denying defendants' motions for judgment notwithstanding the jury's verdict ("JNOV") and for a new trial. For the following reasons, we affirm in part, reverse in part, and remand with instructions.

R.T. Hudgins ("plaintiff"), a real estate agent, and WKS entered into a partnership agreement in June 1999. Wagoner is and at all relevant times has been the president of WKS. The sole purpose of the partnership between plaintiff and WKS was to acquire certain property in the city of Burlington, North Carolina ("the Property") for the purpose of profit through real estate trading and development. The partners agreed to share all costs and all benefits equally. In order to facilitate its purchase, the partnership paid money for a temporary,

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

exclusive option to purchase the Property. When that option expired, it was renewed. Each option cost \$5,000.00 and was paid equally by plaintiff and by defendants.

When the second option was nearing expiration, plaintiff and Wagoner discussed whether they would renew the option again. On or about 28 June 2000¹, plaintiff told Wagoner that plaintiff would agree with whatever decision Wagoner made concerning renewal of the option. Wagoner told plaintiff that, if they were going to extend the option or do anything else with the Property, Wagoner would contact plaintiff and let plaintiff know. Shortly after this conversation, defendants' attorney contacted plaintiff and offered to buy him out of the partnership for \$2,000.00.² Plaintiff declined. To the best of plaintiff's knowledge, no further actions were taken by or on behalf of the partnership after that time, although the partnership was never dissolved formally. Plaintiff had no communications with defendants or their agents after that time, until initiation of these legal proceedings.

In late June or early July 2000, at the expiration of the partnership's option, WKS entered into a new option to purchase the Property. Plaintiff was not informed of this action. Through CD&J of Burlington, LLC ("CD&J"), another company of Wagoner's, Wagoner purchased the Property for approximately \$300,000.00.³ Subsequently, a portion of the Property was sold to Dr. Sans for \$300,000.00. At the time of trial in February 2008, a large portion of the Property was under contract, with Karing Construction agreeing to buy portions of it for more than \$3.5 million. A small portion of the land still is owned solely by Wagoner and his companies; Wagoner estimated the value of this land to be approximately \$150,000.00 to \$175,000.00. Although the housing development has had problems

1. Plaintiff's amended complaint refers to a conversation between plaintiff and Wagoner on 28 June 2000. Other materials provided in the record refer to the meeting as having taken place in "late June 2000." For clarity, we adopt 28 June 2000 as the date of the conversation between plaintiff and Wagoner.

2. There is a discrepancy in the record as to whether \$2,000.00 or \$2,500.00 was offered to plaintiff to buy him out of the partnership. However, the precise amount of the offer is immaterial to our analysis in the case *sub judice*.

3. The closing document lists the price as \$310,000.00. This number takes into account the two \$5,000.00 options paid by the earlier partnership between plaintiff and WKS. This appears to indicate that plaintiff's money was used to buy the land. Wagoner claimed in court that this number was an overstatement and was his attorney's method of "accounting for this closing and accounting for [Wagoner's] \$5,000.00 that was in there with [plaintiff's]."

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

and is not expected to show any profit, on 30 March 2007 Wagoner estimated his profit to be \$700,000.00.

In October 2006, a friend of plaintiff's, who happened to drive by the Property, called plaintiff to tell him that he observed activity on the site. Plaintiff then learned that Waterfalls, LLC, ("Waterfalls") another of Wagoner's companies, had a sign on the Property. Plaintiff, having learned of the actions taken by defendants, brought suit against Wagoner, WKS, Waterfalls, and CD&J, alleging breach of partnership agreement, breach of fiduciary duties, unjust enrichment, and fraud.

Upon defendants' motion, the trial court dismissed (1) all claims against Waterfalls and CD&J and (2) the claims of breach of partnership agreement, breach of fiduciary duty, and unjust enrichment against defendants. The issue of fraud by Wagoner and WKS went to the jury. The jury found for plaintiff, awarding plaintiff \$250,000.00 in compensatory damages and \$250,000.00 in punitive damages. Defendants moved for JNOV and, in the alternative, for a new trial. The trial court denied both motions. Defendants appeal.⁴

I.

On appeal, defendants first make several arguments that the trial court erred by denying their motion for JNOV: (1) that plaintiff's fraud claim is barred by the statute of limitations, (2) that plaintiff failed to plead and prove fraud properly, (3) that plaintiff did not present sufficient evidence for the jury to determine damages, and (4) that the jury's award of punitive damages was improper. We disagree as to (1) through (3), and, for the reasons set forth below, we reverse and remand as to (4).

[1] Defendants first argue that the trial court erred in not granting their motion for JNOV.

On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury. The hurdle is high for the moving party as the motion should be denied if there is more than a scintilla of evidence to support the plaintiff's *prima facie* case.

Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God, Inc., 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000) (citations omitted). However, a "[m]ere scintilla of evidence, or evidence

4. Plaintiff appealed on other grounds, but subsequently dismissed his appeal.

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

raising only suspicion, conjecture, guess, surmise or speculation, is insufficient to take the case to the jury.” *Shuford v. Brown*, 201 N.C. 17, 25, 158 S.E. 698, 702 (1931). Furthermore,

“[i]n considering any motion for directed verdict [or JNOV], the trial court must view all the evidence that supports the non-movant’s claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant’s favor.”

Jones v. Harrelson & Smith Contr’rs, LLC, 194 N.C. App. 203, 214, 670 S.E.2d 242, 250 (2008) (quoting *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 337-38 (1985)), *aff’d*, 363 N.C. 371, 677 S.E.2d 453 (2009) (per curiam).

Defendants first assert that plaintiff’s claim is barred by the statute of limitations. North Carolina General Statutes, section 1-52(9) creates a three-year statute of limitations during which time a fraud claim may be brought. This three-year clock begins running when plaintiff discovers—or should have discovered in the course of reasonable diligence—the fraud. *Forbis v. Neal*, 361 N.C. 519, 524-25, 649 S.E.2d 382, 385-86 (2007). When a fraud should have been discovered in the exercise of reasonable diligence generally is a question for the jury, especially when the evidence is “inconclusive or conflicting.” *Id.* (citations omitted).

After the trial, the jury entered a verdict in which they found, *inter alia*, that plaintiff neither knew nor should have known prior to 12 December 2003 of activities taken by Wagoner or WKS with respect to the Property “after late June 2000.” At trial, defendants claimed that plaintiff should have had knowledge of the events in question in July 2000. However, plaintiff testified that he did not know about the development until 2006. Plaintiff corroborated his testimony with the timing of his filing, which occurred immediately after the time he testified he discovered defendants’ actions. Plaintiff’s testimony, consistent with his explanation of his actions, is more than a “[m]ere scintilla of evidence,” enabling a jury to make a decision based upon more than just “suspicion, conjecture, guess, surmise or speculation.” *Shuford v. Scruggs*, 201 N.C. 685, 687, 161 S.E. 315, 316 (1931).

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

There also was more than a scintilla of evidence presented that plaintiff would not have learned of the alleged fraud through reasonable diligence. Plaintiff testified that he, in the course of his job as a real estate broker, regularly searched the Multiple Listing Service (“MLS”) database of real estate listings. Specifically, plaintiff typically searched for larger tracts of land listed for sale. Plaintiff testified that if the Property had been listed for sale, he would have expected to have seen it. Plaintiff, a real estate broker, believed that he could reasonably anticipate that his efforts would bring to his attention any important facts about the Property. Although a listing for the Property was placed on the MLS on 7 October 2003, plaintiff testified that he did not see any listing for the Property.

Accordingly, in view of plaintiff’s testimony, we hold that more than a scintilla of evidence existed and, therefore, the trial court properly allowed the jury to determine whether plaintiff exercised reasonable diligence to discover defendants’ fraud. *See Forbis*, 361 N.C. at 524-25, 649 S.E.2d at 385-86. Plaintiff’s credibility is a matter for the jury, and its determination will not be disturbed here. *Crocker v. Roethling*, 363 N.C. 140, 147, 675 S.E.2d 625, 631 (2009) (“[M]atters of credibility are for the jury, not for the trial court.”) (citing *Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940)). Therefore, we hold that the trial court appropriately left the credibility determination to the jury and that the jury properly found that plaintiff did not know nor “should he reasonably have known before December 12, 2003 of the activity of Defendant, G W Wagoner, Jr. or Defendant, WKS Corporation after late June 2000 relating to the Foster property.”

[2] Defendants next argue that plaintiff failed to plead and prove fraud properly. We disagree.

Fraud requires a “ ‘(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.’ ” *Forbis*, 361 N.C. at 526-27, 649 S.E.2d at 387 (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)). The North Carolina Rules of Civil Procedure, Rule 9(b), requires that “[i]n all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” N.C. Gen. Stat. § 1A-1, Rule 9(b) (2007). This requirement ensures a defendant will be informed sufficiently of the allegations brought against him, because a fraud claim may cover a broad range of actions and statements. *See Terry v. Terry*, 302 N.C. 77, 85, 273

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

S.E.2d 674, 678 (1981). “[I]n pleading actual fraud⁵[,] the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations.” *Id.* See also *Coley v. Bank*, 41 N.C. App. 121, 125, 254 S.E.2d 217, 219 (1979) (“The pleader . . . must state with particularity the time, place and content of the false misrepresentation . . . [and] must identify the particular individuals who dealt with him when he alleges that he was defrauded by a group or association of persons.”) (citations omitted). “‘While the facts constituting the fraud must be alleged with particularity, there is no requirement that any precise formula be followed or that any certain language be used.’” *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 481, 593 S.E.2d 595, 598 (2004) (quoting *Carver v. Roberts*, 78 N.C. App. 511, 513, 337 S.E.2d 126, 128 (1985)). “‘It is sufficient if, upon a liberal construction of the whole pleading, the charge of fraud might be supported by proof of the alleged constitutive facts.’” *Carver v. Roberts*, 78 N.C. App. 511, 513, 337 S.E.2d 126, 128 (1985) (quoting *Manufacturing Co. v. Taylor*, 230 N.C. 680, 686, 55 S.E.2d 311, 315 (1949)). A requirement of specificity is not a requirement of perfect and complete specificity. See *Hunter*, 162 N.C. App. at 481, 593 S.E.2d at 598; see also *Carver*, 78 N.C. App. at 513, 337 S.E.2d at 128.

Initially, defendants contend that plaintiff’s complaint is not sufficiently particular and that the proof of defendants’ fraud offered at trial was inconsistent with plaintiff’s allegation. With respect to their challenge of plaintiff’s pleadings, defendants argue that plaintiff’s amended complaint’s paragraphs numbered 26 and 33—read together but otherwise in isolation—are not sufficiently particular to plead fraud properly. We disagree.

In relevant part, plaintiff’s amended complaint provides:

25. R.T. Hudgins told Mr. Wagoner on or about June 28, 2000 that he wanted the partnership through W.K.S. to exercise its option to purchase the property.

26. Wagoner and W.K.S. falsely led Hudgins to believe as a result of that conversation that W.K.S. would allow the option to expire

5. We note that *Terry* distinguishes between actual and constructive fraud. See *Terry*, 302 N.C. at 82-85, 273 S.E.2d at 677-79. Notwithstanding, the parties in the case *sub judice* fail to distinguish between the two and limit their argument to actual fraud. Accordingly, we only address plaintiff’s pleadings in view of the requirements for sufficiently pleading actual fraud. See N.C. R. App. P. 28(b)(6) (2007).

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

and that Wagoner and W.K.S. would not take further action with regard to the partnership or the partnership Property.

27. Despite these fraudulent representations, Defendant Wagoner began a fraudulent scheme to purchase and hide the purchase of the Property from Mr. Hudgins.

28. Without informing Mr. Hudgins, W.K.S. subsequently extended the option to purchase the property and ultimately simply assigned the rights to the option to Defendant C D & J of Burlington, LLC.

29. C D & J of Burlington, LLC purchased the Property partly using Hudgins' investment.

30. The Property was ultimately transferred to another of Wagoner's corporations, Waterfalls, LLC on February 23, 2006.

. . . .

33. As outlined herein, Defendant Wagoner and W.K.S. made representations to Mr. Hudgins that their activities were complete with regard to the partnership property.

34. Defendants Wagoner and W.K.S. engaged in a fraudulent scheme through the use of newly formed LLCs to purchase and hide the purchase of the property from Mr. Hudgins.

35. Such acts damaged Mr. Hudgins who is now entitled to compensatory damages and punitive damages in excess of \$10,000.

Although plaintiff's allegations did not go so far as to include either verbatim dialogue of his conversation with Wagoner or an intricate and transparent explanation of the corporate transactions by which Wagoner purchased the Property⁶, plaintiff did allege that the fraudulent misrepresentation occurred during a conversation between him and Wagoner on or about 28 June 2000. Furthermore, the nature of the misrepresentation made during that conversation was "that W.K.S. would allow the option to expire and that Wagoner

6. "The presence of fraud, when resorted to by an adroit and crafty person, is at times exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote it. Under such conditions, the inferences legitimately deducible from all the surrounding circumstances furnish, in the absence of direct evidence, and often in the teeth of positive testimony to the contrary, ample ground for concluding that fraud has been resorted to and practiced by one or more of the parties." *Terry*, 302 N.C. at 82, 273 S.E.2d at 677 (citations omitted).

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

and W.K.S. would not take further action with regard to the partnership or the partnership Property.” As a result of Wagoner’s misrepresentation and subsequent actions taken by Wagoner and WKS “without informing [plaintiff,]” defendants purchased and hid the purchase of the Property from plaintiff. Plaintiff alleged that these actions entitled him to compensatory and punitive damages in excess of \$10,000.00. Accordingly, we hold that plaintiff sufficiently pleaded a cause of action for fraud. *See Terry*, 302 N.C. at 85, 273 S.E.2d at 678 (“[I]n pleading actual fraud the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations”).⁷

[3] Defendants also contend that plaintiff’s evidence at trial did not comport with his pleadings. Specifically, defendants address plaintiff’s testimony that Wagoner had told him, “[I]f we were going to extend the option or do anything else on the property, [Wagoner] would let [plaintiff] know.”

At trial, in relevant part, the following exchange occurred:

Q As June 2000 began to end, did you have any conversations with Mr. Wagoner about renewing the option?

A I did.

Q What happened there?

A I went down to his office and we discussed whether or not we would extend the option again and I told him that we would do whatever he wanted to do. And he ultimately told me that if we were going to extend the option or do anything else on the property he’d let me know.

Q What did he say about it?

A He said if he was going to extend the option or do anything else on the property he’d let me know.

7. Although the complaint does not allege an exact “place” as set forth in *Terry*, defendants limit their challenge of the sufficiency of plaintiff’s pleadings to an isolated reading of paragraphs numbered 26 and 33, *supra*. Notwithstanding, when testing the legal sufficiency of the pleadings pursuant to a *de novo* review, on these facts, we do not perceive the limited absence of a the disclosure of a precise geographic location of a “face to face” conversation or a caveat that the conversation was conducted via telephone to be material, especially in view of defendants’ answer to plaintiff’s amended complaint that admitted that the conversation occurred on 28 June 2000 but denied any fraud or misrepresentation.

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

Q Did he let you know?

A No.

....

Q Did he tell you at the time that the partnership agreement was over?

A No.

Notwithstanding defendants' assertion that the foregoing testimony is inconsistent with plaintiff's allegations, we believe the testimony illustrates the basis for plaintiff's allegations that on 28 June 2000, Wagoner and plaintiff discussed whether WKS would exercise the option to purchase the Property, Wagoner's assertion that he would let plaintiff know if any action was to be taken with respect to the Property, and Wagoner's subsequent silence led plaintiff to believe that no action had been or was to be taken with respect to the Property.

Furthermore, defendants argue that the statement in question was too vague and indefinite to be a "[f]alse representation or concealment of a material fact." *See Forbis*, 361 N.C. at 526-27, 649 S.E.2d at 387 (citation and internal quotation marks omitted). During the 28 June 2000 discussion between plaintiff and Wagoner, Wagoner told plaintiff that "if we were going to extend the option or do anything else on the property [Wagoner] would let [plaintiff] know." Defendants claim that the phrase, "let him know," is vague. As used in the context of plaintiff's discussion with Wagoner, the phrase "let him know" is a sufficient indication of Wagoner's intent to inform plaintiff of "anything else [to be done] on the property."

Defendants also contend that the phrase, "anything else," is vague. However, we believe that doing "anything else on the property" is a broad, but inclusive statement reasonably encompassing any activity or action involving the Property. Even if this were vague, the previous words, "extend the option" are very clear and refer to the exact action in question here. We hold that the statement is not too vague to support a claim of fraud.

[4] Defendants next challenge plaintiff's offer of proof with respect to Wagoner's intent. "As a general rule, a mere promissory representation will not be sufficient to support an action for fraud. A promissory misrepresentation may constitute actionable fraud when it is made with intent to deceive the promisee, and the promisor, at the

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

time of making it, has no intent to comply.” *Johnson v. Ins. Co.*, 300 N.C. 247, 255, 266 S.E.2d 610, 616 (1980) (citations omitted), *abrogated on other grounds*, *Meyers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 569, 374 S.E.2d 385, 391-92 (1988). Juries often have little access to direct evidence of a person’s intent and therefore may infer intent from the totality of the properly admitted evidence. *See Jones*, 194 N.C. App. at 215, 670 S.E.2d at 250.

Here, there was more than a scintilla of evidence from which the jury reasonably could have concluded that Wagoner intended to deceive plaintiff and had no intention of complying with his statement that “if we were going to extend the option or do anything else on the property [Wagoner] would let [plaintiff] know.” The evidence, viewed in the light most favorable to plaintiff, shows that Wagoner made this statement, then tried to buy out plaintiff, and then took actions concerning the Property without first informing plaintiff. Given the brief time lapse between these events—less than a full month—a jury reasonably could infer from the evidence presented that Wagoner did not intend to keep plaintiff informed and involved in the Property, and that Wagoner wanted to deceive plaintiff so as to not have to share profits with him.

[5] Defendants further claim that plaintiff did not reasonably rely upon the statement. Defendants correctly state that “[r]eliance is not reasonable if a plaintiff fails to make any independent investigation[.]” *MacFadden v. Louf*, 182 N.C. App. 745, 747, 643 S.E.2d 432, 434 (2007) (quoting *RD&J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 744, 600 S.E.2d 492, 498 (2004)). However, “[t]he reasonableness of a party’s reliance is a question for the jury, unless the facts are so clear that they support only one conclusion.” *State Properties, LLC v. Ray*, 155 N.C. App. 65, 73, 574 S.E.2d 180, 186 (2002). As we previously have stated, at trial, evidence was presented of plaintiff’s searches of the MLS reports, which failed to inform him of defendants’ actions. The reasonableness of these actions as independent investigation is for the jury, and the facts are not “so clear that they support only one conclusion.” *Id.* Furthermore, as it relates to fraud in purchases of property, reliance is not unreasonable if the plaintiff can show that “it was induced to forego additional investigation by the defendant’s misrepresentations.” *RD&J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 746, 600 S.E.2d 492, 499 (2004) (citations and internal quotation marks omitted). A jury also could have found that Wagoner’s assertion that he would inform plaintiff if he did “anything else on the property” was sufficient to

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

induce plaintiff to forego further investigations, thereby satisfying the reasonable reliance requirement.

For the foregoing reasons, we hold that (1) plaintiff's pleadings were sufficiently particular to plead a cause of action for fraud properly; (2) plaintiff's proof at trial comported with his pleadings; (3) the necessary elements of fraud were supported by sufficient evidence to reach the jury; and (4) the trial court did not err in denying defendants' motion for JNOV with respect to plaintiff's pleadings or proof of fraud.

[6] In their third argument on appeal, defendants argue that there was not sufficient evidence presented at trial for the jury to determine damages. We disagree.

Our Supreme Court has stated that,

[i]n proving damages, absolute certainty is not required but evidence of damages must be sufficiently specific and complete to permit the jury to arrive at a *reasonable conclusion*. Damages may be recovered if a plaintiff proves the extent of the harm and the amount of money representing adequate compensation with *as much certainty as the nature of the tort and the circumstances permit*.

Fortune v. First Union Nat. Bank, 323 N.C. 146, 150, 371 S.E.2d 483, 485 (1988) (internal citations and quotation marks omitted) (emphasis added). We hold that, in this case, plaintiff's damages were proven with sufficient certainty to support the jury's award. The jury heard evidence as to damages from both parties, including evidence as to (1) how much money defendants have made to date, (2) how much they have contracted to be paid in the future, (3) how much they estimate their profit to be, and (4) how much money the project on the whole has lost. See *Southern Watch Supply Co. v. Regal Chrysler-Plymouth*, 82 N.C. App. 21, 30, 345 S.E.2d 453, 459 (1986) (explaining that prices agreed to be paid for an object is a fair valuation of the object). Expert testimony and mathematical formulas are not required to meet the burden of proof concerning damages. See *United Leasing Corp. v. Guthrie*, 192 N.C. App. 623, 630-31, 666 S.E.2d 504, 507-10 (2008) (holding lay witness testimony consisting of estimations by a project manager with limited knowledge of the value or the nature of the product was sufficient evidence, along with a showing of the witness's basis of knowledge, to allow the amount of damages to be determined by the jury).

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

Furthermore, the amount of damages was neither excessive nor contrary to law. “In a fraud case, damage is the amount of loss caused by the difference between what was received and what was promised through a false representation.” *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 256, 507 S.E.2d 56, 65 (1998). Plaintiff here showed that Wagoner has made a profit from the Property, from the land he has sold and been paid for, from the land he has sold and which is currently under contract, and from the land he still owns. Evidence exists suggesting that plaintiff had been led to believe he would receive half of the profits from the Property. The highest estimate of Wagoner’s profit exceeds \$500,000.00. Giving every reasonable interpretation and inference to plaintiff, \$250,000.00—half of the profit realized by defendants—is not an unreasonable recovery for defendants’ fraud. *See id.*

[7] In their fourth argument on appeal, defendants contend that the jury had an insufficient basis upon which to award punitive damages. Pursuant to our Supreme Court’s recent holding in *Scarborough v. Dillard’s, Inc.*, 363 N.C. 715, 721-22, 693 S.E.2d 640, 644, (2009), we are constrained to reverse the trial court’s denial of defendants’ motion for JNOV on this limited issue, and we must remand the matter to the trial court for entry of a written opinion with respect to punitive damages as set forth in *Scarborough*. *See id.* at 721-23, 693 S.E.2d at 644 (holding that the standard of review upon a motion for JNOV with respect to punitive damages is clear and convincing evidence produced by the nonmovant of an aggravating factor set forth in section 1D-15 of our General Statutes which also is related to the injury for which the jury awarded compensatory damages and explaining that the trial court must enter a written opinion setting forth, with specificity, “its reasons for upholding or disturbing the finding or award.”) (citing N.C. Gen. Stat. § 1D-50 (2007)).

North Carolina General Statutes, section 1D-15 states that punitive damages are permitted only when compensatory damages are allowed and some aggravating factor, such as fraud, is proven by clear and convincing evidence. N.C. Gen. Stat. § 1D-15 (2007). For the tort of fraud, the aggravating factor may be intrinsic to the tort.⁸

8. While no aggravating factor is necessary beyond the fraud alleged in the complaint, it still is required for punitive damages that the fraud be proven by clear and convincing evidence. *See Scarborough*, 363 N.C. at 721, 693 S.E.2d at 644 (“[T]he General Assembly intended that the quantum of evidence be more than would be sufficient to uphold liability for the underlying tort”). Therefore, it is possible for a jury to find someone liable for fraud by preponderance of the evidence, but not find an aggravating factor of fraud by clear and convincing evidence. *See id.*

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

Newton v. Ins. Co., 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976). For the reasons previously stated, the jury had sufficient evidence to find the necessary aspects of a charge of fraud, and to find evidence of plaintiff's damages, defendants' profits, and defendants' efforts to keep its actions from plaintiff's attention.

Furthermore, the jury was instructed correctly that, for punitive damages, they must find fraud by "clear and convincing" evidence. N.C. Gen. Stat. § 1D-15(b) (2007). *See also Scarborough*, 363 N.C. at 720, 693 S.E.2d at 643 ("[A] claimant 'must prove the existence of an aggravating factor by clear and convincing evidence.' ") (citing N.C. Gen. Stat. § 1D-15(b) (2007)).

Notwithstanding, our Supreme Court expressly held

that in reviewing a trial court's ruling on a motion for judgment notwithstanding the verdict on punitive damages, our appellate courts must determine whether the nonmovant produced clear and convincing evidence from which a jury could reasonably find one or more of the statutory aggravating factors required by N.C.G.S. § 1D-15(a) and that that aggravating factor was related to the injury for which compensatory damages were awarded.

Scarborough, 363 N.C. at 721-22, 693 S.E.2d at 644. The Court explained that

[r]eviewing the trial court's ruling under the "more than a scintilla of evidence" standard does not give proper deference to the statutory mandate that the aggravating factor be proved by clear and convincing evidence. Evidence that is only more than a scintilla cannot as a matter of law satisfy the nonmoving party's threshold statutory burden of clear and convincing evidence.

Id. at 722, 693 S.E.2d at 644.

Furthermore, the Court instructed as follows:

[T]his Court, in reviewing trial court rulings on motions for directed verdict and judgment notwithstanding the verdict, has held that the trial court should not make findings of fact, and if the trial court finds facts, they are not binding on the appellate court. *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, [1]58-59, 179 S.E.2d 396, 398-99 (1971). Moreover, the language of the statute does not require findings of fact, but rather that the trial court "shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages.” N.C.G.S. § 1D-50. That the trial court utilizes findings to address with specificity the evidence bearing on liability for punitive damages is not improper; the “findings,” however, merely provide a convenient format with which all trial judges are familiar to set out the evidence forming the basis of the judge’s opinion. The trial judge does not determine the truth or falsity of the evidence or weigh the evidence, but simply recites the evidence, or lack thereof, forming the basis of the judge’s opinion. As such, these findings are not binding on the appellate court even if unchallenged by the appellant. These findings do, however, provide valuable assistance to the appellate court in determining whether as a matter of law the evidence, when considered in the light most favorable to the nonmoving party, is sufficient to be considered by the jury as clear and convincing on the issue of punitive damages.

Id. at 722-23, 693 S.E.2d at 644-45 (emphasis added).

The case *sub judice* does not contain a written opinion stating the trial court’s reasons for upholding the final award. Pursuant to the Supreme Court’s express holding and clear instruction based upon a statutory mandate, we are constrained to reverse the trial court’s denial of defendants’ motion for JNOV with respect to punitive damages, and we remand the matter for the limited purpose of entering a written opinion as to those damages in view of *Scarborough*. See *id.*

For the foregoing reasons, we hold that defendants’ motion for JNOV properly was denied except as to punitive damages, which must be reconsidered as explained, *supra*.

II.

Next, defendants argue that the trial court erred in not granting their motion for a new trial pursuant to North Carolina General Statutes, section 1A-1, Rule 59(a) because (1) plaintiff untimely identified the alleged misrepresentation, (2) plaintiff presented improper evidence to the jury, and (3) plaintiff’s attorney made improper closing arguments. We disagree.

“A trial court’s ruling on a motion for a new trial under Rule 59 is usually subject to an abuse of discretion standard.” *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citing *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982)). “‘It has been long settled in our jurisdiction that an appellate court’s review of a

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.' " *Id.* (quoting *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982)). " 'A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.' " *Crocker v. Roethling*, 363 N.C. 140, 156, 675 S.E.2d 625, 636 (2009) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

[8] Defendants first argue that the trial court erred by denying their motion for a new trial because plaintiff untimely identified the alleged misrepresentation that purportedly had not been pleaded with sufficient particularity, which (1) "made it practically impossible for [defendants] to adequately call, examine, and cross-examine witnesses regarding the fraud claim[.]" and (2) "constituted surprise which ordinary prudence could not have guarded against." Therefore, defendants argue, the trial court should have granted a new trial pursuant to North Carolina Rules of Civil Procedure, Rule 59(a)(1) and (3). *See* N.C. Gen. Stat. § 1A-1, Rule 59(a)(1), (3) (2007). We disagree.

We already have held that, on these facts, plaintiff's pleadings were sufficiently particular. Therefore, any argument with respect to the sufficiency of the pleadings has been addressed and is without merit. Furthermore, although defendants argue that "[t]he trial court did not identify the misrepresentation at issue until after the close of plaintiff's evidence[.]" defendants fail to support this assertion with any reference to the multi-volume transcript of the proceedings at trial or to the record in contravention of North Carolina Rules of Appellate Procedure, Rule 28(b)(6). *See* N.C. R. App. P. 28(b)(6) (2007) ("Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of the proceedings, or the exhibits."). Defendants also failed to offer any binding authority or analysis in support of their bare assertion that the purportedly late identification of the misrepresentation made it "practically impossible" to "call, examine, and cross-examine witnesses regarding the fraud claim" and that this constituted an irregularity pursuant to which the trial court should have granted a new trial. *See* N.C. Gen. Stat. § 1A-1, Rule 59(a)(1) (2007).

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

In support of their argument, defendants cite, *Burton v. Weyerhaeuser Timber Co.*, 1 F.R.D. 571 (D. Or. 1941), without further explanation. See also 2 G. Gray Wilson, *North Carolina Civil Procedure*, § 59-5, at 59-12-13 (3d ed. 2007). Wilson cites *Burton* for the proposition that

a new trial was awarded where a factual defense was not disclosed during a pretrial hearing and plaintiff was not in a position to rebut the evidence offered against him at trial.

2 G. Gray Wilson, *North Carolina Civil Procedure*, § 59-5, at 59-12-13 n.82. In *Burton*, the plaintiff complained that he received a disabling burn from muriatic acid from an acid carboy returned by the defendant. *Burton*, 1 F.R.D. at 573. Notwithstanding the parties' pretrial hearing, during which they were "expected to disclose all legal and fact issues which they intend[ed] to raise at trial," during the trial, the defendant improperly made a demonstration that muriatic acid could not have caused plaintiff's burn; rather the burn was a sulphuric burn. *Id.* at 572-73.

Neither *Burton* nor Wilson's treatise are binding authority on this Court, and we do not believe that the improper irregularity at issue in *Burton* is a fair comparison to the alleged untimely identification of the misrepresentation in the case *sub judice*. Without more, we must overrule defendants' argument.

With respect to defendants' claim that "ordinary prudence could not have guarded against" the alleged surprise resulting from the late identification of the misrepresentation at issue, defendants fail to disclose or reference any discovery conducted to avoid or mitigate their purported surprise.⁹ Furthermore, as with the preceding argument, defendants offer no authority or substantive argument in support of their bare assertion of surprise. Accordingly, defendants' assertion is overruled.

[9] In defendants' second argument for a new trial, defendants contend that the trial court erred by allowing the jury to hear testimony concerning an unrelated felony to which Wagoner had pleaded guilty. We disagree.

The only information the jury heard on this topic is that Wagoner "gave up [his] broker's license" because "[t]he real estate commission

9. We acknowledge that the record does contain excerpts from a deposition taken of plaintiff as well as various documentary exhibits; however, defendants make no attempt to show that they made any effort during discovery, which could constitute "ordinary prudence," to avoid surprise.

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

asked [Wagoner] to either give [the license] up or they would take [it] away” as per “their rules.” All information concerning the felony was discussed during *voir dire* and outside the presence of the jury. Plaintiff’s counsel, upon learning of the situation in *voir dire*, withdrew his question concerning why Wagoner had to give up his license, conceding that it was a sustainable objection. The trial court, in *voir dire*, said it would sustain the objection. While the trial court did not tell the jury that an objection had been sustained, no objection was made in the presence of the jury. Furthermore, no motion to strike or to instruct the jury to disregard the statements about Wagoner’s license was made. “[The trial] court does not err by failing to give a curative instruction if one is not requested” unless the error or impropriety is “extreme.” *Smith v. Hamrick*, 159 N.C. App. 696, 699, 583 S.E.2d 676, 679 (2003).

In this case, questions concerning Wagoner’s forfeiture of his license were asked in good faith and any purported impropriety was not extreme. Therefore, we hold that the trial court did not abuse its discretion in denying this motion for a new trial due to the lack of a curative instruction.

[10] In defendants’ final argument on appeal, defendants claim that plaintiff’s closing argument was improper and that the trial court’s failure to give a curative instruction *ex mero motu* required the granting of a new trial. We disagree.

Defendants cite *Crutcher v. Noel*, 284 N.C. 568, 572, 201 S.E.2d 855, 857 (1974), which states, “[w]hen counsel makes an improper argument, it is the duty of the trial judge, upon objection or *ex mero motu*, to correct the transgression by clear instructions.” However, it is not the duty of the trial court to completely take over the role and responsibilities of opposing counsel. It is not every minor mistake that *requires* a court to intercede; it is the general rule that a party must make an objection or request curative instructions. *See, e.g., Hamrick*, 159 N.C. App. at 699, 583 S.E.2d at 679. It is only when the error and the unfair prejudice are extreme that a court *must* intervene. *See id.*

In *Crutcher*, the attorney, in his closing statement, made claims about exactly what testimony would have been offered by specific witnesses, who had not been called, had they been called. *Crutcher*, 284 N.C. at 573, 201 S.E.2d at 858. The trial court overruled objections to these statements. *Id.* at 571-73, 201 S.E.2d at 857-58. This was reversible error because of the manifest unfairness of an attorney

HUDGINS v. WAGONER

[204 N.C. App. 480 (2010)]

stating facts and testimony not included in the record, thereby denying his opponent “the guaranteed rights of confrontation and cross-examination.” *Id.* at 573, 201 S.E.2d at 858.

In this case, the statement complained of on appeal concerned plaintiff’s attorney’s impeachment of Wagoner. From the trial court’s act of sustaining defendants’ objection, it appears that plaintiff’s attorney went too far in questioning the reliability of a witness. A lawyer may argue that the jury should believe one witness over another but may not call a witness a liar. *See, e.g., Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 98, 515 S.E.2d 30, 35 (1999) (“It is improper for a lawyer to assert his opinion that a witness is lying. However, the mere fact that counsel makes such an argument does not automatically establish that the argument is grossly improper.”). There is a fine line between the two, and, in this case, the lawyer’s misstep was not so grievous as to say that Wagoner is a liar or was lying. Instead, he made statements which “*could be construed* as reflecting his personal belief that [Wagoner] was dishonest or untrustworthy in his testimony.”¹⁰ (emphasis added). Furthermore, the narration of the closing argument discloses that “[t]his argument was made in the context of Mr. Brown’s argument to the jury that the testimony of the parties dramatically conflicted, and that the jurors would have to decide what was the truth as to this case.” Such testimony, which was ambiguous and could be construed multiple ways, was not extreme in its prejudicial nature.¹¹ Therefore, the trial court was not required to intervene *ex mero motu* or to grant a new trial. *Hamrick*, 159 N.C. App. at 699, 583 S.E.2d at 679. We hold that the trial court did not abuse its discretion in refusing to

10. The closing arguments were not transcribed. A narration of the arguments was settled pursuant to an order from the trial court and is included in the record on appeal.

11. Compare this language with the language from *Couch*, which we determined was not prejudicial: (1) “There is nothing worse than a liar because you can’t protect yourself from a liar. . . . [T]hese people, and all the doctors that they paraded in here who told you lie, after lie, after lie”; (2) “They lied to your face, blatantly. They didn’t care. They tried to make fools of everybody in the courtroom”; (3) “In your face lies”; (4) “. . . they knew before they put their hands on the Bible that they were going to tell those lies and [Defendants’ attorney] put them up anyway. That’s heavy. That’s a heavy accusation”; (5) “Well, I don’t know what you call it but that’s a lie. That’s not even—that’s not shading the truth . . . How is that not a lie? How is that not a lie?”; (6) “So you see, when I say a lie, okay, I want the record to reflect that I mean a lie”; (7) “Now let me ask you this, how do you think that they intend to get out from under all these lies?”; (8) “This is another blatant lie”; (9) “When they parade these witnesses in one after another and lied to your face. I mean, they were not even smooth about it.” *Couch*, 133 N.C. App. at 97, 515 S.E.2d at 34-35.

IN RE A.R.D.

[204 N.C. App. 500 (2010)]

grant the defendants a new trial due to plaintiff's attorney's impeachment of Wagoner.

Conclusion:

For the foregoing reasons, we (1) affirm, in part, the trial court's order denying defendants' motion for JNOV; (2) reverse, in part, and remand the matter to the trial court for entry of a written opinion with respect to the award of punitive damages as required by North Carolina General Statutes, section 1D-50 and explained by *Scarborough*, 363 N.C. at 722-23, 693 S.E.2d at 644-45; and (3) affirm the trial court's order denying defendants' motion for a new trial.

Affirmed in part; Reversed in part; Remanded.

Judges McGEE and HUNTER, Jr., Robert N. concur.

IN THE MATTER OF: A.R.D.

No. COA10-153

(Filed 15 June 2010)

1. Termination of Parental Rights— guardian ad litem for parent—not appointed

The trial court did not abuse its discretion by not appointing a guardian *ad litem* for respondent mother in a termination of parental rights hearing where there was no evidence presented of any circumstance which would call into question respondent-mother's mental competence, her ability to perform mentally, or to act in her own interest.

2. Termination of Parental Rights— termination order—not timely entered—not prejudicial

There was no prejudicial error in a termination of parental rights action by the trial court's failure to enter the termination order within ninety days of the filing of the petition to terminate her parental rights. Additional visits with the child or a custody hearing would not have changed the ultimate outcome of the termination proceeding.

Judge BEASLEY dissenting.

IN RE A.R.D.

[204 N.C. App. 500 (2010)]

Appeal by respondent from order entered 25 August 2009 by Judge Mitchell McLean in Alleghany County District Court. Heard in the Court of Appeals 25 May 2010.

Pamela Newell, for Guardian ad Litem.

Susan J. Hall, for respondent-mother.

MARTIN, Chief Judge.

Respondent-mother appeals from the trial court's order terminating her parental rights to juvenile A.R.D. Respondent-mother contends the trial court abused its discretion by failing to appoint a guardian ad litem for her, and contends the trial court failed to conduct the termination hearing within ninety days of the filing of the petition to terminate her parental rights. We affirm.

The Alleghany County Department of Social Services ("DSS") became involved with this family when A.R.D.'s maternal grandfather ("grandfather") contacted DSS to report respondent-mother's erratic behavior. Respondent-mother had told the grandfather that she "was going to put A.R.D. in the trash, cut her up and put her in the garbage disposal and that she hated A.R.D." A social worker responded to the report with a home visit on 16 October 2006, and respondent-mother still appeared very depressed and resentful. On the same date, DSS filed a petition alleging that A.R.D. was neglected and lived in an environment injurious to her welfare. The district court entered an order for nonsecure custody, and placed A.R.D. with the grandfather.

On 7 November 2006, the district court entered an order adjudicating A.R.D. abused and neglected. The district court found that A.R.D. "shows no visible signs of neglect. She is clean, appropriately dressed and well-nourished. However, what concerns the Court is the mother's temper, her emotional imbalance and her extreme resistance to an authority figure such as DSS." The district court ordered that A.R.D. remain in DSS custody and in the current placement with the grandfather, and that respondent-mother be evaluated by a psychiatrist or psychologist and comply with treatment recommendations. Respondent-mother agreed, in a consent order entered 17 January 2007, to comply with terms of her case plan.

After a review hearing on 10 April 2007, the district court ordered that A.R.D. be placed in respondent-mother's physical custody for a trial placement, and that respondent-mother continue to comply with mental health services and parenting classes. The next day,

IN RE A.R.D.

[204 N.C. App. 500 (2010)]

respondent-mother called DSS and stated that she could not care for A.R.D. because of her own conflicts with the grandfather. When respondent-mother learned that A.R.D. would be placed in foster care and a social worker came to remove A.R.D. from the home, respondent-mother screamed at the social worker, attempted to block the car from leaving the home, and had to be restrained by law enforcement. In an order entered 14 May 2007, the district court continued A.R.D. in foster care, but did not relieve DSS of reunification efforts.

In a court report prepared 19 June 2007, DSS noted that respondent-mother had completed anger management and parenting classes, obtained income, and completed one session of family counseling. DSS, however, noted that the conflict between respondent-mother and the grandfather prevented respondent-mother from adequately parenting A.R.D. On 20 November 2007, the district court entered a permanency planning order. The district court found that respondent-mother had served a written relinquishment of her parental rights on DSS, and ordered that the permanent plan for A.R.D. be changed to termination of parental rights.

On 13 May 2008, DSS filed a petition to terminate respondent-mother's parental rights. In the petition, DSS recounted respondent-mother's history of emotional outbursts and erratic behavior. DSS alleged that "[t]he combination of [respondent-mother's] depression, uncontrollable temper, and emotional imbalance has rendered [her] incapable of properly caring for her child and creates an atmosphere of potential danger for the Juvenile."

As grounds for termination, DSS alleged that A.R.D. was a neglected juvenile, that A.R.D. had lived outside the home for more than twelve months and respondent-mother had failed to make reasonable progress toward correcting the conditions that led to her removal, that respondent-mother had not provided any financial support for A.R.D. while A.R.D. had been placed outside the home, that A.R.D. was dependent and that respondent-mother was incapable of providing proper care, and that respondent-mother had willfully abandoned A.R.D. On 29 May 2008, the district court entered an order in which it concluded that respondent-mother was unable to identify A.R.D.'s father and ordered that the father be served by publication. The father has not been a party to these proceedings.

On 8 July 2008, respondent-mother filed an answer to the termination petition, in which she denied most of the allegations and coun-

IN RE A.R.D.

[204 N.C. App. 500 (2010)]

terclaimed for custody of A.R.D. DSS responded to the counterclaim on 21 July 2008. In a review order entered on 14 October 2008, the district court noted that reunification efforts ceased on or about 30 October 2007. The district court found that respondent-mother had completed anger management and parenting classes and obtained income, but DSS still considered her “emotionally unstable.” The permanent plan for A.R.D. remained termination of respondent-mother’s parental rights and adoption.

In a report dated 2 April 2009, the guardian ad litem for A.R.D. reported that respondent-mother had cut off contact with DSS and the guardian ad litem and refused to provide her address or phone number. The guardian ad litem reported that A.R.D. needed “emotional security,” and that respondent-mother “has consistently showed [sic] signs of emotional instability and poor judgment.” The case came on for adjudication hearings on 7 January 2009, 11 March 2009, and 12 May 2009. Respondent-mother testified on her own behalf at the 12 May 2009 hearing.

On 26 June 2009, the trial court entered an adjudication order in which it concluded that grounds existed to terminate respondent-mother’s parental rights based on neglect and the willful failure to make reasonable progress toward correcting the conditions that led to A.R.D.’s removal from the home. The trial court specifically found:

The combination of the mother’s uncontrollable temper, emotional imbalance, dishonest behavior, uncooperative nature and actual specific acts of abuse and neglect as cited hereinabove have rendered the mother incapable of properly caring for her child, has created an atmosphere of potential danger for the Juvenile and establish by clear cogent and convincing evidence that her parental rights should be terminated[.]

After a disposition hearing on 12 August 2009, the trial court entered a 25 August 2009 disposition order in which it adopted the salient findings of fact from the adjudication order, made some additional findings, and concluded that it was in A.R.D.’s best interests to terminate respondent-mother’s parental rights. Respondent-mother appeals.

[1] We first address respondent-mother’s argument that the trial court abused its discretion by failing to appoint her a guardian ad litem. We disagree.

Our General Statutes provide that a trial court may appoint a guardian ad litem for a parent in a termination of parental rights case

IN RE A.R.D.

[204 N.C. App. 500 (2010)]

“if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest.” N.C. Gen. Stat. § 7B-1101.1(c) (2009).

“A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge’s attention, which raise a substantial question as to whether the litigant is *non compos mentis*.” *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005). Whether to conduct such an inquiry is in the sound discretion of the trial judge. *Id.* “It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). This Court has also reviewed findings of diminished capacity for abuse of discretion. *In re M.H.B.*, 192 N.C. App. 258, 266, 664 S.E.2d 583, 588 (2008). “A ruling committed to a trial court’s discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *White*, 312 N.C. at 777, 324 S.E.2d at 833.

Under N.C.G.S. § 35A-1101, an incompetent adult is defined as

an adult . . . who lacks sufficient capacity to manage the adult’s own affairs or to make or communicate important decisions concerning the adult’s person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

N.C. Gen. Stat. § 35A-1101 (2009). Likewise, “our Court has also defined diminished capacity in the juvenile context as a lack of ability to perform mentally.” *In re M.H.B.*, 192 N.C. App. at 262, 664 S.E.2d at 586 (internal quotation marks omitted). We conclude that the record does not evidence any circumstance which would call into question respondent-mother’s mental competence, her ability to perform mentally, or to act in her own interest.

Respondent-mother testified at the disposition hearing that she was doing some work at the ambulance base and in home health care, and that she worked at a convenient store. At the adjudication hearing, she testified that she provided in home health care to two patients, one of whom had dementia, and that she had a clean work

IN RE A.R.D.

[204 N.C. App. 500 (2010)]

history with both patients. She testified that she was working toward her EMT license.

Respondent-mother likens her case to *In re N.A.L. & A.E.L., Jr.*, 193 N.C. App. 114, 666 S.E.2d 768 (2008), where this Court found error in failing to appoint a guardian ad litem for respondent-mother where “the allegations made by DSS and the diagnosis of respondent-mother” indicated “problems in controlling her anger outbursts; her significant tendency to be aggressive towards others;” her low IQ; a personality disorder; and Borderline Intellectual Functioning. *Id.* at 118-19, 666 S.E.2d at 771. The trial court, in the case *sub judice*, mentions respondent-mother’s “emotional imbalance” and states that “[respondent-mother] admits that her psychiatric evaluation found her to ‘have a flare for dramatic behavior,’ be easily excited, be prone to emotional outbursts, be overly sensitive to the opinions of others and be impulsive and rebellious.” There was also anecdotal evidence of some erratic behavior by respondent-mother presented at the hearing. However, none of this evidence amounts to a diagnosis of a mental health issue or indicates that respondent-mother was unable to handle her own affairs. Therefore, we conclude that the trial court did not abuse its discretion in failing to inquire as to respondent-mother’s competency, and overrule this assignment of error.

The dissent notes the trial court’s various findings of fact about respondent-mother’s erratic behavior, including that she was involuntarily committed after an incident where she had to be subdued by the police. The dissent believes that this behavior evidences a mental condition that resembles that of the parents in *In re N.A.L. & A.E.L., Jr.*, 193 N.C. App. 114, 666 S.E.2d 768 (2008), and *In re M.H.B.*, 192 N.C. App. 258, 664 S.E.2d 583 (2008). We believe that one critical distinguishing factor between *In re N.A.L.* and *In re M.H.B.* and the current case is the existence of a diagnosis of a mental illness. In *In re M.H.B.*, the trial court notes that the father alleged he suffered from posttraumatic stress disorder and had been diagnosed as being manic depressive and bipolar. *In re M.H.B.*, 192 N.C. App. at 262-63, 664 S.E.2d at 586. The trial court further found that the father had received mental health treatment and was back on his medication for his mental illness. *Id.* In addition, the trial court noted that the father did not know why he was at the adjudication hearing. *Id.* Likewise, in *In re N.A.L.*, the mother was “diagnosed as having Personality Disorder NOS and Borderline Intellectual Functioning.” *In re N.A.L.*, 193 N.C. App. at 118, 666 S.E.2d at 771. Additionally, we note that although the dissent points out singular similarities between the

IN RE A.R.D.

[204 N.C. App. 500 (2010)]

three cases such as the fact that the father in *In re M.H.B.* threatened to commit suicide and the trial court in the case *sub judice* believed that respondent-mother may harm herself, when viewing the totality of the circumstances, the parents in *In re N.A.L.* and *In re M.H.B.* showed significant evidence of incapacity that respondent-mother does not. *Id.*; *M.H.B.*, 192 N.C. App. at 263, 664 S.E.2d at 586. We reemphasize that respondent-mother in the case *sub judice* was able to testify on her own behalf at both the 12 May 2009 adjudication and the disposition hearing, and there was no evidence to suggest that respondent-mother was diagnosed with any mental health disorder. In fact, respondent-mother answered “No,” when she was asked at the 12 May 2009 hearing, “[P]rior to this action being brought have you ever been diagnosed by a mental health professional as [having] any kind of—mental health disorder?”

Although, as the dissent notes, the mother was ordered to undergo a psychological evaluation, the results of the evaluation do not appear in the record, and any use of those results in our review as evidence that she was incompetent would be purely speculative. The mere fact that the trial court ordered an evaluation is not dispositive in itself, especially because the consent order makes it clear that the evaluation and following of the recommendations were part of a plan so that respondent-mother could resume visitation. As respondent-mother had made threats to harm A.R.D. in the past, it would be prudent to require a psychological evaluation before visitation was resumed. In any event, as we have noted here, doubting respondent-mother’s ability to parent A.R.D. does not necessarily indicate to the trial court that respondent-mother was incapable of handling *her* affairs.

[2] Respondent-mother’s remaining argument is that the trial court failed to enter the termination order within ninety days of the filing of the petition to terminate her parental rights. “The hearing on the termination of parental rights shall be conducted . . . no later than 90 days from the filing of the petition or motion unless the judge pursuant to subsection (d) of this section orders that it be held at a later time.” N.C. Gen. Stat. § 7B-1109(a) (2009). Section (d) provides that “[c]ontinuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance.” N.C. Gen. Stat. § 7B-1109(d). Time limitations in the juvenile code are not jurisdictional, and the appellant bears the burden of proving any

IN RE A.R.D.

[204 N.C. App. 500 (2010)]

delay was prejudicial. See *In re C.L.C., K.T.R., A.M.R. & E.A.R.*, 171 N.C. App. 438, 443, 615 S.E.2d 704, 707 (2005), *aff'd per curiam, disc. review improvidently allowed*, 360 N.C. 475, 628 S.E.2d 760 (2006).

In this case, DSS filed the petition to terminate respondent-mother's parental rights on 13 May 2008. The first adjudication hearing was not held until 7 January 2009, well beyond the ninety day statutory time period. Respondent-mother asserts that she was prejudiced because she was not allowed additional visitation with A.R.D. and because the trial court did not proceed on her motion to modify custody presented in her counterclaim. We conclude that additional visits with A.R.D. or a custody hearing would not have changed the ultimate outcome of the termination proceeding. Respondent-mother presented no evidence that she had rectified the situation which led to A.R.D.'s removal in the ninety days between 13 May 2008 and 13 August 2008, or between 13 August 2008 and the hearing on 7 January 2009. Thus, the trial court possessed the requisite grounds to terminate parental rights on all three dates and respondent-mother was not prejudiced by the delay in the proceeding. See *In Re J.M.Z., R.O.M., R.D.M. & D.T.F.*, 184 N.C. App. 474, 480, 646 S.E.2d 631, 635 (2007) (Steelman, J. dissenting) (stating that there was a lack of prejudice because "[n]o assertion [was] made that had [respondent-mother] been allowed visitation that she would have been able to demonstrate that she had rectified" the circumstances which led to her children's removal), *rev'd and remanded per curiam*, 362 N.C. 167, 655 S.E.2d 832 (2008) (adopting the reasoning of the Court of Appeals dissent). Thus, we find no prejudicial error and overrule this assignment of error.

Affirmed.

Judge HUNTER concurs.

Judge Beasley dissents in a separate opinion.

BEASLEY, Judge dissenting.

With regard to the majority's holding that the trial court did not abuse its discretion by failing to appoint a guardian ad litem for Respondent, I respectfully dissent.

Our general statutes provide that a trial court may appoint a guardian ad litem for a parent in a termination of parental rights case,

IN RE A.R.D.

[204 N.C. App. 500 (2010)]

“if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest.” N.C. Gen. Stat. § 7B-1101.1(c) (2009). “A trial judge has a duty to *properly inquire* into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge’s attention, which raise a substantial question as to whether the litigant is *non compos mentis*.” *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005) (emphasis added) (citing *Rutledge v. Rutledge*, 10 N.C. App. 427, 432, 179 S.E.2d 163, 166 (1971)). Whether to conduct such an inquiry is in the sound discretion of the judge. *Id.* “However, [a] court’s complete failure to exercise discretion amounts to reversible error.” *In re M.H.B.*, 192 N.C. App. 258, 261, 664 S.E.2d 583, 585 (2008) (quoting *State v. McVay*, 174 N.C. App. 335, 340, 620 S.E.2d 883, 886 (2005)).

In this case, although Respondent was able to testify at the adjudication and disposition hearings, our review of the record makes it clear that her mental health was paramount to the allegations against her and her ability to comply with the trial court’s orders. DSS initially investigated a report made by Respondent’s father of Respondent’s depression and threats against A.R.D. Respondent had told A.R.D.’s grandfather that she had walked by A.R.D.’s bed and struck it because she hated A.R.D. and that she was going to throw A.R.D. in the trash. On 7 November 2006, the trial court entered an order adjudicating A.R.D. abused and neglected. The trial court found that A.R.D. “show[ed] no visible signs of neglect. She is clean, appropriately dressed and well-nourished. However, what concerns the [c]ourt is the mother’s temper, her emotional imbalance and her extreme resistance to an authority figure such as DSS.” In fact, the trial court found that when DSS returned with a deputy sheriff pursuant to a Non-Secure Custody Order, Respondent assaulted the deputy and then came toward him with a kitchen knife.

It is also noteworthy that the trial court qualified Respondent’s ability to testify by finding that she “became extremely belligerent and emotional while testifying at this adjudication hearing” and found “[Respondent’s] resentment and unwillingness to cooperate with DSS [to be] at a level rarely seen by this [c]ourt.” The trial court ordered that A.R.D. remain in DSS custody and in the current placement with the maternal grandfather, and that Respondent be evaluated by a psychiatrist or psychologist and comply with treatment recommendations. On 16 January 2007, Respondent agreed, in a consent order, to comply with the terms of her case plan.

IN RE A.R.D.

[204 N.C. App. 500 (2010)]

The only reference in the record to the evaluation results is in the petition to terminate parental rights, which mentions that Respondent submitted to the evaluation but did not follow the recommendations. There is no evidence in the record of the results of the psychological evaluation or a potential diagnosis for Respondent's behavior. Moreover, there is no indication that the trial court relied on any of the results from the psychological evaluation.

After a review hearing on 10 April 2007, the trial court ordered that A.R.D. be placed in Respondent's physical custody for a trial placement and that Respondent continue to comply with mental health services and parenting classes. In its order dated 1 May 2007, in finding of fact 7, the trial court found that the next day,

[o]n April 11 the mother called DSS to state that she could not take care of the Juvenile and that the problems between her and her father were so great that she could not take care of her daughter. DSS made the decision to place the Juvenile in foster care rather than return the Juvenile to the grandfather so as to improve the relationship between [Respondent] and her father. When [Respondent] learned that the Juvenile was going to foster care she lost control of her temper, screamed at the social worker, went to the car containing the Juvenile trying to open the door and even put her feet in front of the car tires to prevent the vehicle from moving. Eventually, law enforcement officers had to be called to subdue her in shackles. As a result of this episode [Respondent] was involuntarily committed to Broughton for one week. This episode convinces the [c]ourt that [Respondent] still retains deep emotional problems and instability. Her comments made about harming her daughter which led to the original removal from her home . . . and this episode convinces the [c]ourt that [Respondent] remains a threat to harm herself, her child or someone else and that further counseling and treatment are needed.

This finding makes clear that the trial court was aware that Respondent had previously been involuntarily committed.

On 13 May 2008, DSS filed a petition to terminate Respondent's parental rights. In the petition, DSS recounted Respondent's history of emotional outbursts and erratic behavior, and alleged that although Respondent had completed court-ordered psychological evaluation, she had failed to complete recommended counseling. DSS alleged that "the combination of [Respondent's] depression, uncon-

IN RE A.R.D.

[204 N.C. App. 500 (2010)]

trolled temper, and emotional imbalance has rendered [her] incapable of properly caring for her child and creates an atmosphere of potential danger for the Juvenile.” Later review orders contain findings that Respondent remained emotionally and mentally unstable despite treatment. Subsequently, in both the adjudication and disposition orders, the trial court found that Respondent’s “uncontrollable temper” and “emotional imbalance” created a dangerous home environment for A.R.D.

Thus, it is apparent that Respondent’s ongoing mental instability was a central cause contributing to the termination of her parental rights. In a review order entered on 14 October 2008, the trial court ordered DSS to cease reunification efforts. The trial court found that Respondent had completed anger management and parenting classes but DSS still considered her “emotionally unstable.”

Recently, this Court addressed this issue in a case with similar determinative facts. See *In re N.A.L. & A.E.L., Jr.*, 193 N.C. App. 114, 666 S.E.2d 768 (2008). In *In re N.A.L.*, the juvenile was alleged to be dependent, and the termination of the mother’s parental rights was due to the mother’s “significant mental health issues which impact her ability to parent this child and meet his needs.” *Id.* at 119, 666 S.E.2d at 771 (internal quotation marks omitted). Our Court concluded that the trial court should have inquired into the respondent-mother’s competency and determined that she was in need of a guardian ad litem. *Id.* at 119, 666 S.E.2d at 771-72. This determination was based on the following facts: (1) the petition specifically alleged the respondent’s incapability of providing proper care and supervision for her child; (2) the respondent had problems controlling anger outbursts and had a significant tendency to be aggressive towards others, including her child; and (3) a psychological assessment diagnosed the respondent as having a personality disorder and below average intellectual functioning. *Id.* at 119, 666 S.E.2d at 771.

In the case *sub judice*, on 26 June 2009, the trial court entered an adjudication order in which it concluded that grounds existed to terminate Respondent’s parental rights based on neglect and the willful failure to make reasonable progress toward correcting the conditions that led to A.R.D.’s removal from the home. The trial court specifically found:

The combination of the mother’s uncontrollable temper, emotional imbalance, dishonest behavior, uncooperative nature and actual specific acts of abuse and neglect as cited hereinabove

IN RE A.R.D.

[204 N.C. App. 500 (2010)]

have rendered the mother incapable of properly caring for her child, has created an atmosphere of potential danger for the Juvenile and establish by clear cogent and convincing evidence that her parental rights should be terminated[.]

As we have already discussed, the petition to terminate Respondent mother's parental rights in this case, as well as the adjudication and disposition orders, cited Respondent mother's continuing mental and emotional instability as a reason for terminating her parental rights. In most of its substantive orders throughout the pendency of this matter, the trial court made findings of fact regarding Respondent's lack of emotional stability and uncontrollable temper. Like *In re N.A.L.*, the petition in this case specifically alleged that Respondent was incapable of properly caring for her child and created an atmosphere of potential danger due to her depression, uncontrollable temper, and emotional imbalance. Respondent exhibited problems controlling her angry and emotional outbursts on several occasions, including displays of aggression towards DSS and her child. While the results of Respondent's psychological evaluation are absent from the record, the trial court considered the opinion of Respondent's behavioral healthcare counselor that Respondent "suffers from depression and anxiety" in its order terminating her parental rights.

In another similarly situated case, *In re M.H.B.*, the respondent claimed to suffer from posttraumatic stress disorder and to have been diagnosed as manic depressive and bipolar. *In re M.H.B.*, 192 N.C. App. at 262, 664 S.E.2d at 586. The trial court's findings of fact included the following: "while [the respondent] was testifying in this case, the [c]ourt noted that he was weeping, crying, confounded, agitated"; the respondent was "mentally and emotionally unstable"; and the respondent had threatened to commit suicide. *Id.* at 262-63, 664 S.E.2d at 586. This Court stated that "these findings raise serious questions as to Respondent's competency, capacity, and ability to adequately act in his own interest." *Id.* at 264, 664 S.E.2d at 587. In concluding that the trial court abused its discretion in failing to hold a hearing as to these questions, we reasoned:

We first recognize that although the trial court made numerous findings of fact that raised doubts as to Respondent's competency, capacity, and ability to adequately act in his own interest, the trial court did not make any findings resolving those doubts in favor of a finding that Respondent was competent and had the capacity and ability to adequately act in his own interest. In fact,

IN RE A.R.D.

[204 N.C. App. 500 (2010)]

the trial court could not have done so because it did not hold a hearing regarding these issues.

Furthermore, in its adjudication order, the trial court ordered that “[Respondent] . . . shall submit to a psychological evaluation and results of the same shall be made available unto [DSS] and the Guardian ad litem for [M.H.B.]” The trial court also ordered that “the Balsam Center shall allow [DSS] and the Guardian ad litem and other parties hereto access to and copies of any and all mental health records of the Balsam Center concerning [Respondent.]” Moreover, in its disposition orders, the trial court “suspend[ed] visitation between [Respondent] and [M.H.B.] at this time pending receipt and review of the reports from the Balsam Center by [DSS].” The trial court gave DSS “the discretion . . . to start visitation between [M.H.B.] and [Respondent],” but only after DSS received and reviewed psychological records concerning Respondent from the Balsam Center. These orders demonstrate that the trial court had concerns regarding Respondent’s competency and capacity that were serious enough to cause the trial court to order Respondent to undergo a psychological evaluation. The trial court even suspended Respondent’s visitation rights pending a psychological evaluation. However, despite these concerns, the record does not show that the trial court considered appointment of a guardian ad litem for Respondent during the adjudication hearing.

Id. at 265-66, 664 S.E.2d at 587-88. In consideration of all the trial court’s concerns regarding the respondent’s ability to act in his own interest, “as reflected in its findings of fact, and the trial court’s subsequent order that Respondent undergo a psychological evaluation,” we reversed the adjudication and disposition orders because the trial court abused its discretion. *Id.* at 266, 664 S.E.2d at 588.

The instant facts are particularly similar. Importantly, *In re M.H.B.* referenced a psychological evaluation, like the one ordered here, but the record’s lack of any report or diagnosis resulting therefrom did not preclude this Court from considering conduct of the respondent which suggested mental illness or inability to act in his own interest. Also, where threats of suicide by the respondent in *In re M.H.B.* appear to have been a weighty factor in our decision, the trial court in this case likewise noted that the episode of 11 April 2007 convinced it that Respondent “remain[ed] a threat to harm herself.” These and the remaining findings by the trial court make it apparent that Respondent’s conduct demonstrated a possible inability to ade-

STATE v. HUEY

[204 N.C. App. 513 (2010)]

quately act in her own interest and that the court's conclusion terminating her parental rights was substantially, if not wholly, related to Respondent's mental and emotional condition. Thus, there appears a reasonable basis to believe that Respondent may be incompetent—"lack[ing] sufficient capacity to manage [her] own affairs or to make or communicate important decisions concerning [her] person [or] family . . . due to mental illness"—or may have diminished capacity—lacking the ability to perform mentally—such that the trial court had a duty to properly inquire into Respondent's competency. *Id.* at 262, 664 S.E.2d at 585.

Following our holdings in *In re N.A.L.* and *In re M.H.B.*, I would reverse and remand for a hearing to determine whether Respondent was in need of a guardian ad litem. *See In re N.A.L.*, 193 N.C. App. at 119, 666 S.E.2d at 772. While I would not hold that the trial court abused its discretion in failing to appoint Respondent a guardian ad litem, I would hold that the trial court did abuse its discretion by failing to conduct an inquiry into whether Respondent needed a guardian ad litem. *Id.*

STATE OF NORTH CAROLINA v. JAMES WESLEY HUEY, DEFENDANT

No. COA09-496

(Filed 15 June 2010)

Search and Seizure—investigatory stop—no reasonable suspicion—motion to suppress improperly denied

The trial court in a possession of heroin case erred in denying defendant's motion to suppress evidence discovered as a result of a police officer's search of defendant. The officer lacked reasonable suspicion to effectuate an investigatory stop of defendant where the officer knew that the suspects were described as being approximately 18 years old, while defendant was 51 years old at the time of the stop.

Appeal by defendant from judgment entered 6 January 2009 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 October 2009.

STATE v. HUEY

[204 N.C. App. 513 (2010)]

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

GEER, Judge.

Defendant James Wesley Huey appeals from his conviction of felony possession of heroin, contending the trial court erred in denying his motion to suppress evidence gained as a result of an allegedly illegal search and seizure. Because (1) the State was bound by its stipulation that the police officer who stopped defendant knew that the suspects he was looking for were approximately 18 years of age, and (2) defendant was 51 years of age as indicated on his identification card, we agree with defendant that the trial court's findings of fact are insufficient to support its conclusion that the officer had reasonable suspicion to stop and detain defendant. We, therefore, reverse the trial court's denial of defendant's motion to suppress.

Facts

On 14 April 2008, defendant was charged with felony possession of heroin. On 16 September 2008, defendant filed a motion to suppress any evidence seized as a result of a stop on 13 October 2007 by an officer with the Charlotte Mecklenburg Police Department. At the hearing on the motion to suppress, the State first stipulated to several facts.

The State stipulated that on 13 October 2007, defendant was riding on a Charlotte Area Transit System ("CATS") bus when the bus was boarded by police officers who asked if anyone had gotten on or off the bus recently. The bus driver told the officers that no one had recently boarded or departed the bus. Defendant subsequently got off the bus and came into contact with Officer Sean Moon, who "was investigating or looking for possible robbery suspects." The State further stipulated that "the description that Officer Moon had to go on was there were two suspects; both suspects were black males, around the age of eighteen, and he had a clothing description for each one."

Officer Moon then took the stand and testified that at 9:22 p.m. on 13 October 2007, he was patrolling the area surrounding Northlake Mall in Charlotte when he received a call for service. The call reported that a person had been robbed in the parking lot of the Belk

STATE v. HUEY

[204 N.C. App. 513 (2010)]

store. According to Officer Moon, the call described the suspects as two black males, one of whom was wearing “a light colored hoodie, bluejeans, and some type of writing on it.” The other suspect was described as wearing “another hoodie that was darker.”

As Officer Moon was patrolling the mall, he noticed defendant walking on the mall property roughly a quarter mile away from the Belk store. Officer Moon testified that defendant’s “clothing drew [his] attention as well as his race and gender.” Moon also testified that the parking lot was lit with “fairly dim lights.” Defendant was wearing “a light colored hoodie” that “was actually almost a cream or yellow hooded sweatshirt, [and] bluejeans.” The sweatshirt “had some type of design on it.” Officer Moon passed defendant, parked his car, got out of the car, and approached defendant to ask for some identification.

Defendant presented a North Carolina identification card, and Officer Moon ran his name and date of birth for a warrant check. Officer Moon learned that there was an outstanding warrant for defendant’s arrest for a worthless check. After discovering the warrant, Officer Moon placed defendant under arrest and searched him. During the search, Officer Moon found in defendant’s right pocket a Bic pen top with a clear plastic baggie containing a white powdery substance protruding out of it. Officer Moon believed the substance in the baggie was cocaine.

Defendant was 51 years old at the time of the stop and 52 at the time of trial. Despite the State’s stipulation, Officer Moon testified that he learned that the suspects being sought for the robbery were approximately 18 years old only after he uncovered defendant’s outstanding arrest warrant.

Defendant took the stand and testified that on the evening of 13 October 2007, he was walking to work at the Estes Trucking Company and was wearing clothing given to him by his employer: a gold hooded sweatshirt with thick black letters spelling “Estes” on it and a black hat with gold letters also spelling “Estes.” As he was walking in the parking lot of the mall, Officer Moon stopped him and asked to see some identification.

Officer Moon told defendant that he fit the description of an armed robbery suspect. Defendant replied that he had just gotten off the bus and was walking to work. He then provided Officer Moon with his identification card. According to defendant, another officer arrived at that point and told Officer Moon, “[T]hat’s not the one, he

STATE v. HUEY

[204 N.C. App. 513 (2010)]

don't fit the description." Defendant testified that at no time during the incident did he feel free to leave.

The trial court subsequently denied defendant's motion to suppress. Defendant noted his appeal from the denial of the motion and indicated that he desired to plead guilty based on that denial. The trial court sentenced defendant to five to six months imprisonment, suspended that sentence, and placed defendant on 24 months supervised probation.

Discussion

The sole issue raised by this appeal is whether the trial court erred in denying defendant's motion to suppress. "The scope of review of the denial of a motion to suppress is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231, 122 S. Ct. 1323 (2002). The trial court's conclusions of law "must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997).

"An investigatory stop must be justified by a *reasonable suspicion*, based on objective facts, that the individual is involved in criminal activity." *In re J.L.B.M.*, 176 N.C. App. 613, 619, 627 S.E.2d 239, 243 (2006). "The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch." *Id.* "To determine whether this reasonable suspicion exists, a court 'must consider the totality of the circumstances—the whole picture.'" *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 298 (2001) (quoting *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994)).

Defendant contends the trial court's conclusion that reasonable suspicion existed for the stop is unsupported by the findings of fact based on competent evidence. The trial court made the following findings of fact:

(1) *By way of stipulation* that on October 13th, 2007 the defendant, James Huey, was on a Charlotte area transit system bus which at some point was boarded by a police officer or police officers who asked the operator of the bus if anyone had got

STATE v. HUEY

[204 N.C. App. 513 (2010)]

[sic] on or off the bus recently and were told no by the bus operator and that at some point after that the defendant got off of that bus and shortly thereafter encountered Officer S. P. Moon of the Charlotte-Mecklenburg Police Department and that *Officer Moon was investigating a robbery and looking for possible suspects and had a description of the robbers which was two black males, age approximately eighteen years, and had a clothing description.*

(2) That Officer S. P. Moon has been in the Charlotte-Mecklenburg Police Department approximately seven years and on the offense date, 10-13-2007, was a patrol officer in uniform in a marked police vehicle.

(3) That at approximately 9:22 P. M. on that day he received a call reference [sic] a robbery of the person at an area outside of the Belk's department store in the parking lot area of the Northlake Mall, that the description that was given regarding the perpetrators of the robbery was as follows: Two black males, one wearing a light colored sweatshirt with a hood referred to as a "hoodie," bluejeans, and that the light colored hoodie had some type of markings or writing on it and the other individual was described as wearing dark clothing, a hoodie, and darker pants.

(4) That Officer Moon began to drive about the property of the Northlake Mall which is a large area and includes a road that runs along the outer boundaries of the area.

(5) As Officer Moon was driving along the road that circles the large area that is the mall area he observed a black male walking in the area wearing a light colored hoodie sweatshirt with hood and bluejeans, and he also noticed that the sweatshirt had a design on it.

(6) That it was approximately 9:30 P. M. when Officer Moon saw the defendant in the area described above.

(7) That the area was dimly light [sic] and Officer Moon told the defendant to stop, that he would like to speak with him.

(8) That the defendant did stop and Officer Moon asked him for some identification which the defendant presented which was a North Carolina identification card.

(9) Officer Moon obtained a name and date of birth from the identification card and ran a warrant check on the name and date

STATE v. HUEY

[204 N.C. App. 513 (2010)]

of birth by way of his police radio. Shortly after that Officer Moon received notification that there was an outstanding arrest warrant for the defendant.

(10) That Officer Moon placed the defendant under arrest for the outstanding warrant and placed handcuffed [sic] on him and searched the defendant incident to arrest.

(11) In the pocket of the clothing that the defendant was wearing Officer Moon found a writing instrument with a clear top and through the clear top could see a baggie protruding from inside the pen top and he could see that the baggie contained some white powdery substance which Officer Moon believed to be powder cocaine. Officer Moon also told the defendant he was being arrested for possession of a controlled substance in addition to the outstanding warrant.

(12) At some point another officer arrived and informed Officer Moon that the suspects were described as being approximately eighteen years old.

(13) *Officer Moon saw on the defendant's identification that he was considerably older than that but at that point had already learned of the outstanding arrest warrant and had already arrested and searched the defendant incident to that arrest.*

(Emphasis added.) The trial court then concluded that “Officer Moon was acting with reasonable suspicion in making an investigative detention of the defendant” and denied defendant’s motion to suppress.

The trial court thus made a finding that the State had stipulated that Officer Moon was looking for a suspect who was approximately 18 years old, but subsequently found that Officer Moon did not learn the approximate age of the suspects until after he had already arrested and searched defendant. Consequently, the primary question posed by this appeal is whether the State was bound by its stipulation that Officer Moon knew at the time he made the initial contact with defendant that the suspects he was looking for were approximately 18 years old.

“A stipulation is a judicial admission and ordinarily is binding on the parties who make it.” *State v. Murchinson*, 18 N.C. App. 194, 197, 196 S.E.2d 540, 541 (1973). In *State v. McWilliams*, 277 N.C. 680, 686,

STATE v. HUEY

[204 N.C. App. 513 (2010)]

178 S.E.2d 476, 480 (1971) (emphasis added) (internal citations and quotation marks omitted), our Supreme Court explained further:

A stipulation of fact is an adequate substitute for proof in both criminal and civil cases. Such an admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence. It is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent of the necessity of producing evidence to establish the admitted fact. *In short the subject matter of the admission ceases to be an issue in the case.*

Thus, under *McWilliams*, the State's stipulation in this case that Officer Moon knew the suspects were approximately age 18 when he first stopped defendant should have caused the question of what Officer Moon knew to "cease[]" to be an issue in the case." *Id.*

The State, however, argues that because defendant failed to object when Officer Moon gave testimony that contradicted the stipulation, he waived his chance to challenge the admission of that testimony, and the State is not bound by its stipulation. As support for this argument, the State relies on *State v. Covington*, 315 N.C. 352, 338 S.E.2d 310 (1986). In *Covington*, the State stipulated that the victim would be unable to make any identification of the co-defendants and, therefore, the State would not be asking the victim to identify the defendant in court. *Id.* at 358, 338 S.E.2d at 314. On appeal, the defendant argued that the State violated this stipulation when the victim identified him as one of the intruders. *Id.* at 314-15. The Court rejected this argument, holding that because the defendant failed to object to the victim's references to the defendant as one of the intruders, he had "waived his right to assign as error the prior admission of the evidence." *Id.* at 359, 338 S.E.2d at 315.

The stipulation in *Covington* and the stipulation in this case served different purposes. In *Covington*, the stipulation was designed to keep certain evidence away from the jury. The defendant could have enforced that stipulation by objecting at the proper time when the evidence was sought to be admitted. In this case, however, the stipulation's purpose was to resolve an issue of fact for purposes of the trial court's decision on the motion to suppress. Defendant did not need to object to Officer Moon's testimony—that testimony simply could not be the basis for a finding by the trial court contrary to the stipulation.

STATE v. HUEY

[204 N.C. App. 513 (2010)]

The State also points to *State v. Flippen*, 349 N.C. 264, 271, 506 S.E.2d 702, 706 (1998), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015, 119 S. Ct. 1813 (1999), in which the State and the defendant had, during the defendant's first capital trial, stipulated that the defendant had no significant history of prior criminal activity. After the Supreme Court, in the appeal from that first trial, ordered a new capital sentencing hearing, the defendant unsuccessfully sought, based on the stipulation in the first trial, to have the trial court give a peremptory instruction on the mitigating circumstance of no significant history of prior criminal activity. On appeal from the second sentencing hearing resulting again in the death penalty, the Supreme Court concluded that the trial court did not err in refusing to give the instruction because "[a]ny evidence that the trial court 'deems relevant to sentenc[ing]' may be introduced in the sentencing proceeding." *Id.* (quoting *State v. Heatwole*, 344 N.C. 1, 25, 473 S.E.2d 310, 322 (1996), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339, 117 S. Ct. 1259 (1997)). The Court explained that "[a] prior stipulation or concession regarding *capital sentencing circumstances* does not limit the parties' presentation of evidence when relevant evidence contradicts that prior stipulation." *Id.*, 506 S.E.2d at 707 (emphasis added).

The State argues that based on *Flippen*, the State was permitted to rely upon evidence that contradicted the prior stipulation. We believe, however, that the Supreme Court in *Flippen* did not intend to overrule *McWilliams sub silentio*, but rather intended that *Flippen's* applicability should be limited to the unique circumstances of the capital sentencing context. The Court reached its conclusion in *Flippen* because in capital sentencing proceedings, "[t]he State must be allowed to present *any* competent evidence in support of the death penalty." *Id.* (emphasis original).

Here, the State has presented no justification for concluding that the State must be allowed to present "*any* competent evidence," *id.*, in a non-capital case—or, as in this case, in a hearing before the trial judge on a motion to suppress. That rationale underlying *Flippen* simply does not apply. We, therefore, hold that in non-capital cases such as this one, *McWilliams* still controls.

The State makes one additional argument for avoiding the *McWilliams* rule. The State points to the principle set out in 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 160, at 514 (6th ed. 2004): "A stipulation as to the truth of facts which would be testified to by an absent witness bars introduction of contradictory evidence; but if the stipulation is only as to the testi-

STATE v. HUEY

[204 N.C. App. 513 (2010)]

mony the absent witness would give, the ‘testimony’ may be contradicted.” Since the stipulation at issue in this case regarding Officer Moon’s knowledge did not purport to describe how any absent witness would testify if present, but rather was an agreement “as to the truth of facts,” the proposition recited by the State does not apply to the stipulation at issue in this case.

In any event, the subject of stipulations arose in this case because defendant had subpoenaed the bus driver, but when the bus driver arrived for the hearing, he did not have the records about which defendant wanted to question him. In order to resolve the problem, the State agreed to stipulate that officers got on the CATS bus, and the driver told them no one had gotten on recently—the truth of the facts to which the bus driver would testify.

At the same time, the State also agreed to stipulate that Officer Moon was originally told that the suspects were approximately 18 years old. Even if one could read the principle in *Brandis & Broun* as the State does—applying to all facts that would be the subject of the testimony of absent witnesses and not just a recitation of what an absent witness would say if called to testify—that principle would not apply to the Officer Moon stipulation because that stipulation did not involve facts about which the bus driver would have testified. The bus driver had no knowledge and would not have testified about what Officer Moon—who was not one of the officers on the bus—knew regarding the description of the suspects.

The State has not, therefore, presented any persuasive basis for excepting this case from the holding of *McWilliams*. We, therefore, hold that the State was bound by its stipulation that Officer Moon knew the suspects he was looking for were approximately 18 years old. Because the issue was removed from the case, the trial court could not rely upon Officer Moon’s testimony otherwise, but rather was required to accept, in making its determination on the legality of the stop, that Officer Moon, at the time he stopped defendant, was looking for suspects who were approximately age 18. If we take all of the trial court’s other findings of fact as true, but strike the findings suggesting that Officer Moon did not know the age of the suspects until after he detained defendant, then the findings of fact do not support the trial court’s conclusion that Officer Moon had reasonable suspicion to detain defendant.

In *United States v. Meadows*, 878 F. Supp. 234, 235, *vacated in part on other grounds on reconsideration*, 885 F. Supp. 1 (D.D.C.

STATE v. HUEY

[204 N.C. App. 513 (2010)]

1995), the police received a radio transmission to be on the lookout for a robbery suspect described as a black male, five feet nine inches tall, weighing 140 pounds, and having a medium brown complexion. In addition, it was reported that the suspect was wearing a brown leather jacket, jeans, brown suede boots, and a black knit ski hat. *Id.* The police officers stopped the defendant, a black male of medium brown complexion, who was six feet one inch tall and weighed 247 pounds. He was wearing a black leather jacket, light colored pants, brown suede boots, and a black knit cap. *Id.* After a search, the defendant was charged with narcotics and weapons violations. *Id.* He subsequently moved to suppress the evidence of the search, contending the officers had no reasonable suspicion to stop him. *Id.*

In reviewing this issue, the court explained that “[i]n the context of a *Terry* stop that flows from a suspect’s description by a crime victim or a tipster, a court must compare the description to the defendant with regard to such factors as clothing, age, race, physical build and proximity to the crime scene.” *Id.* at 238. The court reasoned that “[t]here [was] simply not the confluence of factors necessary to justify the stop in this case.” *Id.* Although the defendant “did match the clothing description fairly closely” and was of the same race as the suspect, the court noted that after that, “the similarities between Larry Meadows and the description on the lookout fade[d].” *Id.* While the description of the suspect was for a lone man on foot, the defendant was with two companions and headed for an automobile, nine blocks from the crime scene. *Id.*

The court explained:

These relatively minor discrepancies could be overlooked in light of the similarity in clothing, race and complexion. When viewed in conjunction with the physical build of Larry Meadows, however, these factors mandate suppression. The lookout was absolutely clear: the suspect was a black man who was five feet nine inches tall and weighed 140 pounds. Larry Meadows is six feet one inch tall black man who, on the night of his arrest, weighed 247 pounds. This is a difference of four inches in height and 107 pounds in weight. It is impossible to conclude that a reasonable officer could have believed that Larry Meadows matched the lookout based on these factors alone. The *gross* disparity between the lookout and Larry Meadows on these two factors is particularly critical because, unlike clothing and location, height and weight cannot be altered in twenty minutes time.

STATE v. HUEY

[204 N.C. App. 513 (2010)]

Officer Robinson may not be a good judge of height and weight from a distance. He may, therefore, have been justified in approaching Larry Meadows initially due to the clothing description alone. However, once he stood next to Larry Meadows, Officer Robinson had to realize that the lookout was for a man shorter and 45-50 pounds lighter than the officer himself, and Larry Meadows is three inches taller and 57-62 pounds heavier than the officer himself. At that point, Officer Robinson should have let Larry Meadows go and the interaction between the police and these defendants should have ceased.

Id. at 238-39. The court then concluded that because “the initial stop of Larry Meadows was not justified by reasonable articulable suspicion, all of the evidence or statements seized by the officers as to all three defendants must be suppressed.” *Id.* at 239.

Similarly, here, the suspects were described as being approximately 18 years old, while defendant was 51 years old at the time of the stop. Even if Officer Moon could not tell defendant’s age when he initially saw defendant walking and pulled his patrol car over to speak with him, once Officer Moon was face to face with defendant, Officer Moon should have been able to tell that defendant was much older than 18 years of age. In any event, as soon as defendant handed Officer Moon his identification card with his birth date, Officer Moon knew that defendant did not match the description of the suspects, and, at that point, the interaction between Officer Moon and defendant should have ended.

The trial court’s conclusion that Officer Moon had reasonable suspicion to detain defendant is not supported by those findings of fact based on competent evidence. We must, therefore, reverse. *See also United States v. Brown*, 448 F.3d 239, 248 (3d Cir. 2006) (holding that because defendant and companion did not match age, height, or facial features of suspects, police had no reasonable suspicion to stop them).

Reversed.

Judges ROBERT C. HUNTER and CALABRIA concur.

DAWSON v. N.C. DEP'T OF ENV'T & NATURAL RES.

[204 N.C. App. 524 (2010)]

DUDLEY A. DAWSON AND JOAN R. DAWSON, PLAINTIFFS v. N.C. DEPARTMENT OF
ENVIRONMENT AND NATURAL RESOURCES, DEFENDANT

No. COA09-109

(Filed 15 June 2010)

**Tort Claims Act— statute of repose inapplicable—actually
constructed improvement required**

The Industrial Commission did not err by concluding that the six-year statute of repose under N.C.G.S. § 1-50(a)(5) relating to claims arising out of a defective or unsafe improvement to real property did not apply to plaintiffs' negligence claim for damages arising out of misrepresentations that certain real property perked and a home could be built on the property. N.C.G.S. § 1-50(a)(5) requires that the action relate to an actually constructed improvement, and no such improvement existed in this case. Defendant failed to demonstrate that any other statute would render the action untimely.

Appeal by defendant from decision and order entered 1 October 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 August 2009.

George B. Daniel, P.A., by George B. Daniel; and Everett Gaskins Hancock & Stevens, LLP, by Michael J. Tadych and James M. Hash, for plaintiffs-appellees.

Attorney General Roy Cooper, by Assistant Attorney General D. Joseph Tanoury, for defendant-appellant.

GEER, Judge.

The North Carolina Department of Environment and Natural Resources ("DENR") appeals from a decision of the Industrial Commission awarding plaintiffs Dudley A. Dawson and Joan R. Dawson damages under the State Tort Claims Act arising out of representations that certain real property perked and a home could be built on the property. After the Dawsons purchased the property and at the point they sought to build a home, they were denied a permit to improve the property because, contrary to the representations, the property was not suitable for a septic system.

DENR's sole argument on appeal is that the Dawsons' claim is barred by the six-year statute of repose in N.C. Gen. Stat. § 1-50(a)(5)

DAWSON v. N.C. DEP'T OF ENV'T & NATURAL RES.

[204 N.C. App. 524 (2010)]

(2009) relating to claims arising out of a defective or unsafe improvement to real property. Because N.C. Gen. Stat. § 1-50(a)(5) requires that the action relate to an actually-constructed improvement and no such improvement exists in this case, we hold that the Commission did not err in concluding that N.C. Gen. Stat. § 1-50(a)(5) does not apply to the Dawsons' claims. As DENR makes no other argument for reversal of the decision in the Dawsons' favor, we affirm.

Facts

The Full Commission made the following findings of fact that have not been challenged on appeal. They are, therefore, binding. *See Drewry v. N.C. Dep't of Transp.*, 168 N.C. App. 332, 333 n.2, 607 S.E.2d 342, 344 n.2, *disc. review denied*, 359 N.C. 410, 612 S.E.2d 318 (2005).

The Dawsons entered into a contract to purchase Lot 29 and Lot 30 in a subdivision in Person County, North Carolina, contingent on the two lots being perkable. The Dawsons asked the Person County Health Department to determine whether Lot 29 and Lot 30 perked and whether the lots could have a house built on them.

Jimmy Clayton, a sanitarian for the Health Department, had the property tested to determine whether the lots perked and could be improved. On 1 March 1989, Clayton issued a Site Classification letter to the Dawsons stating that Lot 29 and Lot 30 perked. After receiving this notification, the Dawsons purchased Lot 29 and Lot 30 for a total purchase price of \$60,000.00 with \$30,000.00 paid at closing and the remaining \$30,000.00 to be financed over the next five years. The Dawsons ultimately paid the total amount due.

From 1989 through 2000, the Dawsons removed some of the trees and underbrush, graded for a driveway, and placed gravel on the driveway. On 4 April 2000, the Dawsons applied for improvement permits with the Health Department in order to build a two-bedroom home on either Lot 29 or Lot 30. The improvements that the Dawsons sought to make in 2000 were identical to what they had proposed to the Health Department in 1989 prior to the Health Department's notifying them that the lots perked and were buildable. Nonetheless, Mike Cash of the Health Department notified the Dawsons that after testing and analysis of the lots, he had determined that neither Lot 29 nor Lot 30 would support the home the Dawsons intended to build. More specifically, Lot 30 would not support any sewage septic disposal system at all. While Lot 29 would support a sewage septic disposal system, it did not have the repair area necessary in order for the

DAWSON v. N.C. DEP'T OF ENV'T & NATURAL RES.

[204 N.C. App. 524 (2010)]

Dawsons to be able to build the home they desired. The Health Department, therefore, denied the Dawsons' request for improvement permits in a notice dated 21 June 2000.

The Dawsons appealed the denial decision. Fred Smith, Regional Soil Scientist with DENR, went to the property and conducted testing. He ultimately determined that neither lot was suitable for installation of an appropriate sewage septic disposal system. After Smith informed Cash of his determination, Cash advised the Dawsons in a letter dated 30 August 2000, but postmarked 5 September 2000, that their improvement permit applications were again denied.

The Dawsons then retained experts to assist them. The experts advised them that if they found a nearby lot that would pass the perk test, that lot could be used as a repair area. The Dawsons ultimately purchased Lot 25 in the same subdivision for \$25,000.00 plus \$515.00 in closing costs. Following the Dawsons' purchase of Lot 25, the Health Department issued an improvement permit to the Dawsons to build a residence on Lot 30 with an active sewage septic disposal system installed on Lot 29 together with the repair area on Lot 25.

On 23 June 2003, the Dawsons filed a negligence claim against DENR under the State Tort Claims Act. The Dawsons alleged they purchased Lot 29 and applied for an improvement permit in reliance on Clayton's letter evaluating the lot as "provisionally suitable" for a septic system, only to have the lot later declared unsuitable and their improvement permit denied. The Dawsons requested damages for the lot purchase price, closing costs, accrued interest, property taxes, grading and clearing expenses, soil scientist fees, and lost lot appreciation, in the total amount of \$127,190.48.

On 11 July 2003, DENR moved to dismiss the claim pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the Rules of Civil Procedure. On 20 October 2005, DENR also moved for summary judgment, contending that it was entitled to summary judgment based on the statute of repose set out in N.C. Gen. Stat. § 1-50(a)(5).

On 16 November 2005, Deputy Commissioner Wanda Blanche Taylor entered an order granting summary judgment to DENR. The Deputy Commissioner concluded that "[a]s plaintiffs did not meet the substantive element of filing their tort claims within the time deadline imposed by the statute of repose, there is no genuine issue as to material fact and defendant is entitled to judgment as a matter of law." The Dawsons gave notice of appeal to the Full Commission on 22 November 2005.

DAWSON v. N.C. DEP'T OF ENV'T & NATURAL RES.

[204 N.C. App. 524 (2010)]

On 16 February 2007, the Full Commission entered an order vacating the Deputy Commissioner's grant of summary judgment to DENR and concluding that N.C. Gen. Stat. § 1-50(a)(5) did not bar the Dawsons' claims. The Full Commission remanded the matter to the Deputy Commissioner for a full evidentiary hearing. On 8 January 2008, after an evidentiary hearing, Deputy Commissioner George T. Glenn, II found DENR negligent and ordered DENR to pay the Dawsons damages for the purchase price, closing costs, lost earnings, appraisal fees, expert fees, and ad valorem taxes for Lot 25. DENR appealed to the Full Commission on 11 January 2008.

On 1 October 2008, the Full Commission entered a decision and order adopting Deputy Commissioner Glenn's decision and order with modifications. The Commission concluded that DENR was negligent and awarded damages to the Dawsons for the purchase price of Lot 25 (\$25,000.00), closing costs for Lot 25 (\$515.00), lost earnings of Mr. Dawson (\$6,750.00) due to time spent addressing the issues, appraisal fees (\$375.00), expert fees (\$900.00), and ad valorem taxes for Lot 25. DENR timely appealed to this Court.

Discussion

DENR's sole contention on appeal is that the Full Commission erred in holding that the Dawsons' tort claim was not barred by the statute of repose set out in N.C. Gen. Stat. § 1-50(a)(5). "The standard of review for an appeal from the Full Commission's decision under the Tort Claims Act 'shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them.'" *Simmons v. Columbus County Bd. of Educ.*, 171 N.C. App. 725, 727, 615 S.E.2d 69, 72 (2005) (quoting N.C. Gen. Stat. § 143-293 (2003)). "Thus, 'when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision.'" *Id.* at 728, 615 S.E.2d at 72 (quoting *Simmons v. N.C. Dep't of Transp.*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998)).

"A statute of repose . . . is a time limitation which begins to run at a time unrelated to the traditional accrual of a cause of action." *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 117, 446 S.E.2d 603, 604 (1994), *aff'd per curiam*, 340 N.C. 257, 456 S.E.2d 308 (1995). "Unlike an ordinary statute of limitations

DAWSON v. N.C. DEP'T OF ENV'T & NATURAL RES.

[204 N.C. App. 524 (2010)]

which begins running upon accrual of the claim, the period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted.' " *Id.* (quoting *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 474-75 (1985)). "A statute of repose is a substantive limitation, and is a condition precedent to a party's right to maintain a lawsuit." *Id.*, 446 S.E.2d at 605.

The statute of repose in N.C. Gen. Stat. § 1-50(a)(5)(a) provides:

No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

N.C. Gen. Stat. § 1-50(a)(5)(b) in turn defines "an action based upon or arising out of the defective or unsafe condition of an improvement to real property" as including:

1. Actions to recover damages for breach of a contract *to construct or repair an improvement* to real property;
2. Actions to recover damages for the *negligent construction or repair of an improvement* to real property;
3. Actions to recover damages for personal injury, death or damage to property;
4. Actions to recover damages for economic or monetary loss;
5. Actions in contract or in tort or otherwise;
6. Actions for contribution [sic] indemnification for damages sustained on account of an action described in this subdivision;
7. Actions against a surety or guarantor of a defendant described in this subdivision;
8. Actions brought against any current or prior owner of the real property or improvement, or against any other person having a current or prior interest therein;
9. Actions against any person furnishing materials, or against any person who develops real property or who performs or furnishes the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of

DAWSON v. N.C. DEP'T OF ENV'T & NATURAL RES.

[204 N.C. App. 524 (2010)]

an improvement to real property, or a repair to an improvement to real property.

(Emphasis added.)

As our Supreme Court has emphasized, when construing a statute, “our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished.” *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). In performing this function, “[l]egislative purpose is first ascertained from the plain words of the statute.” *Id.* See also *O & M Indus. v. Smith Eng’g Co.*, 360 N.C. 263, 267-68, 624 S.E.2d 345, 348 (2006) (“The first consideration in determining legislative intent is the words chosen by the legislature.”). When the words are unambiguous, “they are to be given their plain and ordinary meanings.” *Id.* at 268, 624 S.E.2d at 348.

Here, the plain language of the statute indicates that the statute does not apply unless the action “aris[es] out of the defective or unsafe condition of an improvement to real property.” N.C. Gen. Stat. § 1-50(a)(5)(a). Indeed, our Supreme Court has held:

In order for this statute to apply, three circumstances must exist: (1) the action must be for recovery of damages to real or personal property, (2) *the damages must arise out of the defective and unsafe condition of an improvement to real property*, and (3) the party sued must have been involved in the designing, planning, or construction of *the defective or unsafe improvement*.

Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 302, 271 S.E.2d 385, 391 (1980) (emphasis added).

Similarly, in *Trustees of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 239, 328 S.E.2d 274, 280 (1985) (emphasis added), the Court held that N.C. Gen. Stat. § 1-50(a)(5) “deals with actions for damages for breach of contract, negligence, and recovery of economic or monetary loss in general *arising from faulty repair or improvement* to real property against, among others, persons who furnish the design for or supervise the construction of *such repair or improvement . . .*” Phrased differently, the statute “deals expressly with claims arising out of *defects in improvement to realty* caused by the performance of specialized services of designers and builders.” *Id.*, 328 S.E.2d at 279-80 (emphasis added).¹

1. Although *Trustees of Rowan Technical College* construed a previous version of N.C. Gen. Stat. § 1-50(a)(5), the opinion’s analysis applies equally to the current version.

DAWSON v. N.C. DEP'T OF ENV'T & NATURAL RES.

[204 N.C. App. 524 (2010)]

In sum, a prerequisite for application of N.C. Gen. Stat. § 1-50(a)(5) is that there must have been an improvement to real property and that improvement must be either defective or unsafe. DENR has cited no case holding or even suggesting that this statute applies even in the absence of the actual construction or repair of an improvement. Nor have we found any such decision.

Here, DENR contends that the case arises out of a negligent design of a septic system by Clayton and a negligent inspection by Clayton. Even assuming, without deciding, that Clayton could be found to have furnished a design of a septic system, that design did not result in the construction of a defective or unsafe improvement as required for application of N.C. Gen. Stat. § 1-50(a)(5)(b)(9). As for the inspection, Clayton did not inspect any improvement on the property; he inspected the real property. Given the plain language of the statute and our Supreme Court's decisions in *Feibus & Co.* and *Trustees of Rowan Technical College*, N.C. Gen. Stat. § 1-50(a)(5) does not apply to this proceeding.

DENR, however, cites *Trustees of Rowan Technical College* as holding that "[t]he statute covers claims for negligent failure to properly design and construct buildings." That case, however, involved an action for architectural and engineering malpractice arising out of structural defects in a completed building. 313 N.C. at 232, 328 S.E.2d at 276. Thus, there was a defective and unsafe improvement to the real property. Ultimately, the Court held that N.C. Gen. Stat. § 1-50(a)(5) applied "where plaintiff seeks damages resulting from the architect's faulty design or supervision, whether those damages are sought merely to correct the defect or as a result of some further injury caused by the defect." 313 N.C. at 242-43, 328 S.E.2d at 282. In other words, a plaintiff could recover damages for the defective improvement or for injury resulting from the defective improvement. Nothing in the case suggests that the statute applies when there has been no actual improvement constructed, as is the case here.

The Dawsons' lawsuit does not allege that in reliance on Clayton's design of a septic system, they built a septic system that ultimately turned out to be defective. Rather, Clayton was required to sketch the septic system as part of his responsibility for determining the suitability of the Dawsons' land for a septic system. The Dawsons relied upon Clayton's representations regarding the suitability of the real property for a particular purpose and not on any design of an improvement that was actually constructed. *Trustees of Rowan*

DAWSON v. N.C. DEP'T OF ENV'T & NATURAL RES.

[204 N.C. App. 524 (2010)]

Technical College contains no language or reasoning that suggests N.C. Gen. Stat. § 1-50(a)(5) applies in that situation.

DENR argues further that this Court, in *Gillespie v. Coffey*, 86 N.C. App. 97, 356 S.E.2d 376 (1987), applied N.C. Gen. Stat. § 1-50(a)(5) “in a case substantially similar to the instant one.” In *Gillespie*, however, the plaintiff brought a negligence claim against the City of Lenoir, contending it was liable for injuries suffered due to the plaintiff’s fall in the remodeled entryway of a restaurant that did not meet building code requirements. The plaintiff claimed that the City had negligently inspected and approved the remodeling. *Id.* at 98, 356 S.E.2d at 377. On appeal, this Court held that the plaintiff’s claim, brought more than six years after the building inspector approved the remodeling, was barred by the statute of repose in N.C. Gen. Stat. § 1-50(a)(5). 86 N.C. App. at 99, 356 S.E.2d at 377. Thus, as in all other cases applying N.C. Gen. Stat. § 1-50(a)(5), the lawsuit arose out of a defective or unsafe improvement actually built on the real property.

DENR, however, contends that this case is similar to *Gillespie* “because both cases involved government inspectors whose duties were to evaluate property for compliance with State laws and public health codes to determine whether applicants would receive permits authorizing the improvement to realty.” The basis of the holding in *Gillespie* was not that it involved a negligent inspection of real property—the claim in this case—but that the City employee negligently inspected an improvement to the real property: the remodeled entryway.

In this case, Clayton was not inspecting an existing septic system to see if it was up to code. He was inspecting the lot to determine if it was suitable land on which to construct an improvement. Because DENR has failed to show the existence of an improvement to real property, we hold that N.C. Gen. Stat. § 1-50(a)(5) does not apply to the Dawsons’ action.

While DENR argues in a footnote that the Commission erred in concluding that N.C. Gen. Stat. § 1-52(16) (2009) applies to this case, we need not address that issue because DENR has made no argument that it was entitled to prevail on the merits on any basis other than N.C. Gen. Stat. § 1-50(a)(5). Even if we were to decide that N.C. Gen. Stat. § 1-52(16) does not apply, as DENR urges, DENR has not demonstrated that any other statute would render the action untimely.

BRYSON v. HAYWOOD REG'L MED. CTR.

[204 N.C. App. 532 (2010)]

The Dawsons, on the other hand, ask this Court to conclude that claims brought under the State Tort Claims Act are not subject to any statute of repose. Because we have rejected DENR's contention that N.C. Gen. Stat. § 1-50(a)(5) applies to the allegations of this case and DENR has not suggested that any other statute of repose is applicable, it is unnecessary to resolve that question. As we have rejected the only argument made by DENR on appeal that would support a decision in DENR's favor—that N.C. Gen. Stat. § 1-50(a)(5) applies to bar the Dawsons' claims—we affirm the Commission's decision awarding damages to the Dawsons.

Affirmed.

Judges ROBERT C. HUNTER and STEELMAN concur.

ALOHA E. BRYSON, M.D., PH.D., PLAINTIFF v. HAYWOOD REGIONAL MEDICAL CENTER, PRIMEDOC MANAGEMENT SERVICES, INC. AND PRIMEDOC OF HAYWOOD COUNTY, P.A., DEFENDANTS

No. COA09-270

(Filed 15 June 2010)

1. Appeal and Error—interlocutory order and appeal—statutory privilege asserted—medical review committee records

An appeal was properly before the Court of Appeals even though it was interlocutory where it involved an assertion of statutory privilege in medical review committee records.

2. Discovery—medical review committee records—privilege not established

The trial court did not err by entering an order compelling discovery of certain documents in an employment action involving a hospital where defendant contended that the documents had been produced by a medical review committee and were protected from discovery under N.C.G.S. § 131E-95(b). The documents did not appear to be privileged on their face, and defendant submitted no affidavits or other evidence to support its claim.

BRYSON v. HAYWOOD REG'L MED. CTR.

[204 N.C. App. 532 (2010)]

Appeal by defendant Haywood Regional Medical Center from order entered 19 December 2008 by Judge Ronald K. Payne in Haywood County Superior Court. Heard in the Court of Appeals 16 September 2009.

Elliot Pishko Morgan, P.A., by Robert M. Elliot, for plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes & Davis P.A., by Allan R. Tarleton, for defendant-appellant Haywood Regional Medical Center.

GEER, Judge.

Defendant Haywood Regional Medical Center (“HRMC”) appeals from the trial court’s order granting in part plaintiff Dr. Aloha E. Bryson’s motion to compel discovery of certain documents. On appeal, HRMC contends the trial court erred in concluding that the documents were not privileged under N.C. Gen. Stat. § 131E-95(b) (2009) and in ordering HRMC to produce and disclose those documents to plaintiff. Because HRMC has failed to meet its burden of showing that the documents fall into one of the three categories of privileged material under N.C. Gen. Stat. § 131E-95(b), we affirm.

Facts

On 26 February 2008, plaintiff filed a complaint in Haywood County Superior Court against HRMC, as well as Primedoc Management Services, Inc. and Primedoc of Haywood County, P.A. (“the Primedoc defendants”). Plaintiff, an internist hired by the Primedoc defendants to work at HRMC from March 2005 to December 2007, alleged that, during her time at HRMC, she became concerned about patient safety issues in the Intensive Care Unit (“ICU”) and Definitive Observation Care Unit (“DOCU”). Plaintiff alleged that she observed numerous nursing errors in the ICU and DOCU, including (1) mistakes in the dosing and administration of patient medication; (2) failure to accurately and completely follow doctors’ orders; and (3) instances of nurses, while on duty, text messaging, using cell phones for personal calls, sleeping, and shopping online.

Plaintiff documented these patient safety issues by filing occurrence reports with HRMC’s risk manager in accordance with hospital policy. According to plaintiff, HRMC officials began pressuring her to cease filing occurrence reports. Plaintiff alleged HRMC gave false information to the Primedoc defendants about her work and directed

that her employment be terminated in retaliation for her complaints about patient care.

Plaintiff asserted claims for wrongful interference with contract and defamation against HRMC. Plaintiff also asserted claims for breach of contract, breach of the covenant of good faith and fair dealing, and constructive discharge against the Primedoc defendants. Plaintiff also brought claims for civil conspiracy, punitive damages, and unfair and deceptive trade practices against all defendants.

On 29 February 2008, plaintiff served HRMC with her first set of interrogatories and her first set of requests for production of documents. In its responses, HRMC refused to respond to several of plaintiff's requests, contending that they sought disclosure of the proceedings, records, and materials produced or considered by a medical review committee, which constituted information protected from discovery under N.C. Gen. Stat. § 131E-95(b).

On 16 September 2008, plaintiff filed a motion to compel discovery. Although HRMC filed a written response to the motion to compel, it did not submit any affidavits or other evidence supporting its claims of privilege. In an order entered 24 October 2008, the trial court directed HRMC to respond to most of plaintiff's discovery requests. With respect, however, to certain interrogatories and requests for production, the trial court ordered HRMC to submit the documents and information for its *in camera* review. After conducting the *in camera* review, the trial court entered an order on 19 December 2008 granting an order protecting some of the documents and ordering others to be produced. HRMC timely appealed to this Court.

Discussion

[1] The trial court's order granting in part plaintiff's motion to compel discovery is an interlocutory order. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999). N.C. Gen. Stat. § 7A-27(d)(1) (2009), however, authorizes an appeal from an interlocutory order that affects a substantial right. "[W]hen, as here, a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under sections 1-277(a) and 7A-27(d)(1)." *Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581.

BRYSON v. HAYWOOD REG'L MED. CTR.

[204 N.C. App. 532 (2010)]

This appeal is, therefore, properly before us. *See Armstrong v. Barnes*, 171 N.C. App. 287, 290-91, 614 S.E.2d 371, 374 (holding challenged discovery order affected substantial right because “assertions of statutory privilege relate directly to the matters to be disclosed under the trial court’s interlocutory discovery order”), *disc. review denied*, 360 N.C. 60, 621 S.E.2d 173 (2005).

[2] The sole issue on appeal is whether the trial court erred in compelling HRMC to disclose certain documents to plaintiff in discovery. “Whether or not the party’s motion to compel discovery should be granted or denied is within the trial court’s sound discretion and will not be reversed absent an abuse of discretion.” *Hayes v. Premier Living, Inc.*, 181 N.C. App. 747, 751, 641 S.E.2d 316, 318-19 (2007) (quoting *Wagoner v. Elkin City Schs. Bd. of Educ.*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994)). It is well established, however, that this Court reviews questions of law, as well as questions of statutory construction, de novo. *Moody v. Sears Roebuck & Co.*, 191 N.C. App. 256, 264, 664 S.E.2d 569, 575 (2008). Thus, we review de novo whether the requested documents are privileged under N.C. Gen. Stat. § 131E-95(b).

The information that HRMC contends on appeal is protected from disclosure can be grouped into two categories. The first category contains three internal documents of HRMC. One document is an e-mail dated 17 December 2007 from Shirley Trantham, HRMC’s director of Risk Management, to Janet Ledford with the subject of “Peer Review Request.” In the e-mail Trantham reviews six instances of patient care at HRMC. The e-mail summarizes each incident, notes whether any occurrence reports were received, and discusses any quality concerns. It does not identify Ms. Ledford, what position she held, or even for whom she worked. Nor does the e-mail indicate who requested the information or for what purpose it was generated.

The second document is a memorandum dated 18 December 2007 with a title indicating that Shirley Harris, former director of Clinical Services at HRMC, requested a review of patient charts. The document, which contains summaries and analyses of six instances of patient care, does not indicate who authored the document, for what purpose it was generated, or who received it.

The third document is a memorandum dated 19 December 2007, authored by Dr. Harry Lipham, Chairman of the Intensive Care Unit at HRMC, and addressed to Shirley Harris and Dr. Nancy Freeman. The

BRYSON v. HAYWOOD REG'L MED. CTR.

[204 N.C. App. 532 (2010)]

memorandum indicates it was authored by Dr. Lipham at the request of "Dr. Freeman from the Hospital Board for information concerning allegations that have been made by Dr. Aloha Bryson concerning [certain patients'] care." It summarizes six patient charts and analyzes the appropriateness of the care provided. The document does not identify who Dr. Freeman is or the purpose for which she requested the information.

The documents in the second category were apparently transmitted between HRMC and an outside company called MDReview. They include (1) a letter to Eileen Lipham of HRMC, written on letterhead with the name "MDReview," that thanks her "for calling on MDReview to assist [her] with [her] peer review needs"; (2) six documents entitled "Peer Review Report" authored by Scott A. Eisman, M.D.; and (3) Dr. Eisman's *curriculum vitae*. Each of the reports warn that "THIS IS A CONFIDENTIAL PEER REVIEW DOCUMENT" and state that the document "was prepared at the request of [HRMC] in order to provide an independent professional opinion of the care rendered" to a specifically-referenced patient.

" 'It is for the party objecting to discovery [of privileged information] to raise the objection in the first instance and he has the burden of establishing the existence of the privilege.' " *Adams v. Lovette*, 105 N.C. App. 23, 28, 411 S.E.2d 620, 624 (quoting 8 C. Wright & A. Miller, Federal Practice and Procedure § 2016 (1970)), *aff'd per curiam*, 332 N.C. 659, 422 S.E.2d 575 (1992). HRMC, therefore, has the burden of establishing that these documents are protected.

HRMC contends the documents are protected by N.C. Gen. Stat. § 131E-95(b), which provides in part:

The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and . . . shall not be subject to discovery or introduction into evidence in any civil action against a hospital . . . which results from matters which are the subject of evaluation and review by the committee.

N.C. Gen. Stat. § 131E-76(5) (2009) in turn defines "[m]edical review committee":

- (5) "Medical review committee" means any of the following committees formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing:

BRYSON v. HAYWOOD REG'L MED. CTR.

[204 N.C. App. 532 (2010)]

- a. A committee of a state or local professional society.
- b. A committee of a medical staff of a hospital.
- c. A committee of a hospital or hospital system, if created by the governing board or medical staff of the hospital or system or operating under written procedures adopted by the governing board or medical staff of the hospital or system.
- d. A committee of a peer review corporation or organization.

“By its plain language, N.C. Gen. Stat. § 131E-95 creates three categories of information protected from discovery and admissibility at trial in a civil action: (1) proceedings of a medical review committee, (2) records and materials produced by a medical review committee, and (3) materials considered by a medical review committee.” *Woods v. Moses Cone Health Sys.*, 198 N.C. App. 120, 126, 678 S.E.2d 787, 791-92 (2009), *disc. review denied*, 363 N.C. 813, 693 S.E.2d 253 (2010). The statute also, however, provides that “information, documents, or other records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee.” N.C. Gen. Stat. § 131E-95(b).

The Supreme Court construed these provisions in *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 83, 347 S.E.2d 824, 829 (1986):

These provisions mean that information, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings; neither should one who is a member of a medical review committee be prevented from testifying regarding information he learned from sources other than the committee itself, even though that information might have been shared by the committee.

The Court explained further: “The statute is designed to encourage candor and objectivity in the internal workings of medical review committees. Permitting access to information not generated by the committee itself but merely presented to it does not impinge on this statutory purpose. These kinds of materials may be discovered and used in evidence even though they were considered by the medical review committee.” *Id.* at 83-84, 347 S.E.2d at 829. *See also Cunningham v. Charles A. Cannon Jr. Mem'l Hosp., Inc.*, 187 N.C. App. 732, 737, 654 S.E.2d 24, 27 (2007) (“However, § 131E-95 applies

BRYSON v. HAYWOOD REG'L MED. CTR.

[204 N.C. App. 532 (2010)]

to the *information* generated by a medical review committee. . . . Regardless of its form, the *information* sought by plaintiff was generated by defendant [physician], not the [medical review committee]. Therefore, the information is discoverable and the trial court did not abuse its discretion in denying defendant's motion for a protective order."), *disc. review denied*, 362 N.C. 356, 661 S.E.2d 244 (2008).

HRMC argues that the e-mail and memoranda in the first category of documents are privileged because they relate to internal peer review investigations of patient charts requested by its Risk Management Department. HRMC contends that it is clear from the face of these documents that they were written for the purpose of evaluating the quality of health care and, therefore, that we can assume they were generated by or for a medical review committee. We do not agree.

In *Hayes*, 181 N.C. App. at 752, 641 S.E.2d at 319, this Court stressed that mere assertions that documents constitute peer review materials and meet the requirements of *Shelton* are insufficient. A trial court properly grants a motion to compel when the "defendants [do] not present any evidence tending to show that the disputed incident reports were (1) part of the [medical review committee's] *proceedings*, (2) *produced* by the [medical review committee], or (3) *considered* by the [medical review committee] as required by N.C. Gen. Stat. § 131E-107." *Hayes*, 181 N.C. App. at 752, 641 S.E.2d at 319. As this Court explained, the statutory requirements

are substantive, not formal, requirements. Thus, in order to determine whether the peer review privilege applies, a court must consider the circumstances surrounding the actual preparation and use of the disputed documents involved in each particular case. The title, description, or stated purpose attached to a document by its creator is not dispositive, nor can a party shield an *otherwise available* document from discovery merely by having it presented to or considered by a quality review committee.

Id. at 752, 641 S.E.2d at 319.

In the analogous attorney-client privilege context, this Court has similarly held that "[m]ere assertions" that privilege applies "will not suffice." *Multimedia Publ'g of N.C., Inc. v. Henderson County*, 136 N.C. App. 567, 576, 525 S.E.2d 786, 792, *disc. review denied*, 351 N.C. 474, 543 S.E.2d 492 (2000). The party claiming privilege must instead proffer "some *objective* indicia" that the privilege applies. *Id.* Here,

BRYSON v. HAYWOOD REG'L MED. CTR.

[204 N.C. App. 532 (2010)]

however, HRMC did not submit any “evidence,” as required by *Hayes*, or “objective indicia,” as required by *Multimedia Publishing*. Instead, like the Court in *Brown v. Am. Partners Fed. Credit Union*, 183 N.C. App. 529, 539, 645 S.E.2d 117, 124 (2007), addressing the attorney-client privilege, “we can only determine the applicability of the privilege based upon what the [documents] reveal on their face.”

Starting with the first category of documents, HRMC has pointed to no evidence in the record that Shirley Trantham, who sent the 17 December 2007 e-mail, or Janet Ledford, who received it, were members of a medical review committee. The author and recipients of the 18 December 2007 memorandum are not even identified. Neither of these documents explicitly states that it was generated by members of a medical review committee or for a medical review committee’s consideration. There is absolutely no evidence in the record from which this Court can infer that either document is privileged under § 131E-95(b). See *Brown*, 183 N.C. App. at 535, 645 S.E.2d at 122 (holding that defendant failed to establish that board of directors meeting minutes were protected by attorney-client privilege because documents listed individuals as being present at meeting, but did not identify their positions and, therefore, defendant could not demonstrate that privilege had not been waived).

The third document, the 19 December 2007 memorandum, indicates that it was authored by the Chair of the Intensive Care Unit at HRMC for Dr. Freeman “from the Hospital Board.” Nothing in the document itself and nothing in the record specifically identifies what “the Hospital Board” is. In plaintiff’s complaint, she alleges that she composed a letter to the Hospital Authority Board of Commissioners about her concerns. Even assuming *arguendo* that this is the “Hospital Board” to which the memorandum refers, the Supreme Court in *Shelton*, 318 N.C. at 84, 347 S.E.2d at 829-30, held that a hospital’s Board of Trustees does not fit the definition of a medical review committee. HRMC has, therefore, failed to present any evidence that the “Hospital Board” in the 19 December 2007 memorandum constituted a medical review committee within the meaning of N.C. Gen. Stat. § 131E-95(b).

Turning to the second category of documents, HRMC contends that the six reports and Dr. Eisman’s *curriculum vitae* are documents generated by a medical review committee because MDReview, the apparent source of these documents, is a “peer review corporation or organization.” HRMC has, however, failed to point to any evidence in the record showing that MDReview is a peer review organi-

TYBURSKI v. STEWART

[204 N.C. App. 540 (2010)]

zation or corporation or that it authored those documents for that purpose. Although the reports identify themselves as peer review documents, as *Hayes* stated, “[t]he title, description, or stated purpose attached to a document by its creator is not dispositive” 181 N.C. App. at 752, 641 S.E.2d at 319. We, therefore, cannot conclude simply from a bare name that MDReview is a peer review organization or corporation. In any event, even if MDReview is a peer review organization or corporation, HRMC has not provided any evidence, as required by N.C. Gen. Stat. § 131E-76(5), that the reports were generated by “[a] *committee* of a peer review corporation or organization.” (Emphasis added.)

In sum, HRMC submitted no affidavits or other evidence to support its claim that the documents at issue were protected from discovery under N.C. Gen. Stat. § 131E-95(b). In addition, the documents on their face do not establish that they are privileged. Thus, HRMC has failed to meet its burden of proof, and accordingly, we affirm the trial court’s order compelling discovery.

Affirmed.

Judges STROUD and ERVIN concur.

STEPHAN TYBURSKI, PLAINTIFF V. GEORGE C. STEWART AND WIFE,
BRENDA B. STEWART, DEFENDANTS

No. COA09-182

(Filed 15 June 2010)

**Negligence— contributory negligence—summary judgment
erroneously granted**

The trial court erred in granting summary judgment in favor of defendants on plaintiff’s negligence claim. Defendants failed to establish as a matter of law that plaintiff was contributorily negligent as there was a genuine issue of material fact concerning the reasonableness of plaintiff’s conduct.

Appeal by plaintiff from order entered 31 October 2008 by Judge Orlando F. Hudson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 2 September 2009.

TYBURSKI v. STEWART

[204 N.C. App. 540 (2010)]

Knott & Berger, L.L.P., by Kenneth R. Murphy, III, for plaintiff-appellant.

Broughton Wilkins Sugg & Thompson, PLLC, by Benjamin E. Thompson, III, for defendants-appellees.

GEER, Judge.

Plaintiff Stephan Tyburski appeals from an order granting summary judgment to defendants George C. and Brenda B. Stewart based on the trial court's conclusion that plaintiff had been contributorily negligent as a matter of law. While staying in defendants' rental house in Oak Island, North Carolina, plaintiff unexpectedly became locked in a sunroom and was injured while trying to escape. Because a genuine issue of material fact exists as to the reasonableness of plaintiff's conduct, we reverse.

Facts

The parties do not significantly dispute the facts. Plaintiff, who is an employee of Progress Energy, had a 30-day work assignment at Progress Energy's nuclear power plant in Brunswick County. During this assignment, plaintiff stayed at defendants' rental house, which Progress Energy had rented for him.

The house had a sunroom that could only be accessed by a glass door from the kitchen. The sunroom door had a "thumb lock" allowing the door to be locked from the kitchen side. When the lock was engaged, reentry into the house from the sunroom required a key. Consequently, if the door were locked, anyone in the sunroom without a key would be unable to reenter the home. This condition constituted a housing violation.

When plaintiff arrived at the house, he noticed the lock on the sunroom door. Because he did not have a key to the lock, plaintiff realized that someone could become trapped in the sunroom if the lock were engaged. He did not report the problem to anyone and did not attempt to disable the lock by, for example, taping the bolt. He did, however, ensure that the lock was not engaged. For the next couple of weeks, he went in and out of the sunroom daily, usually closing the door behind him. He experienced no problems with the door.

Plaintiff's injury occurred on the morning of 16 March 2007, approximately two weeks into his stay. Plaintiff returned to the house from an overnight shift, slept, awoke, and decided to cook some food.

TYBURSKI v. STEWART

[204 N.C. App. 540 (2010)]

He began frying potatoes and onions in oil on the stove. He then went into the sunroom to warm himself while his food cooked. Without checking the lock, he closed the door behind him, as he normally did, in order to keep the warmth in the sunroom. From the sunroom, he was able to see the stove.

When he decided he should go back inside to stir his food, he realized that the door was locked and he had no way out of the sunroom. He later learned that when his son had visited over the weekend, his son had locked all the doors to the house, including the sunroom door. Plaintiff first tried to jiggle the handle and force the door open. When that did not work, he tried to get the attention of passing bicyclists and drivers. Those efforts were also unsuccessful.

Plaintiff then tried to open a window on the wall of the sunroom adjoining the bedroom, but the window was locked on the bedroom side. Plaintiff recognized, however, that this particular type of window (a “double hung” window with two panes, one above the other) would tilt in, and he could see a gap between the window and the track. Plaintiff believed that if he could remove the window from the track, he could avoid damaging defendants’ property. He kept glancing at the stove while he worked, and he had managed to work the window partly out of its track when he noticed that smoke had begun “coming out off the stove, and it was actually rolling . . . across the ceiling.” He “knew that a fire was imminent.”

At about that point, the glass shattered, severely cutting plaintiff’s arm. Plaintiff also suffered cuts on his chest and leg. Using a sock, he made a tourniquet for his arm before climbing through the window and turning off the stove. He then obtained medical care for his injury.

On 13 March 2008, plaintiff filed a complaint against defendants alleging negligence. In their answer, defendants alleged that plaintiff’s claims were barred by contributory negligence. Defendants subsequently filed a motion for summary judgment on 6 August 2008, arguing solely that no genuine issue of material fact existed on the question of plaintiff’s contributory negligence. The trial court granted defendants’ motion for summary judgment, and plaintiff timely appealed to this Court.

Discussion

Summary judgment is appropriate if “there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a

TYBURSKI v. STEWART

[204 N.C. App. 540 (2010)]

matter of law.” N.C.R. Civ. P. 56(c). A party may seek summary judgment on the grounds of an affirmative defense. *Azalea Garden Bd. & Care, Inc. v. Vanhoy*, 196 N.C. App. 376, 386, 675 S.E.2d 122, 128, *disc. review denied*, 363 N.C. 580, 682 S.E.2d 206 (2009).

This Court reviews a trial court’s grant of summary judgment de novo. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). The burden is on the movant to establish that there are no triable issues of fact. *Fairview Developers, Inc. v. Miller*, 187 N.C. App. 168, 170, 652 S.E.2d 365, 367 (2007), *disc. review denied*, 362 N.C. 176, 658 S.E.2d 484 (2008). On appeal, this Court views the record in the light most favorable to the non-moving party, drawing all reasonable inferences in the non-movant’s favor. *Gaskill v. Jennette Enters., Inc.*, 147 N.C. App. 138, 140, 554 S.E.2d 10, 12 (2001), *disc. review denied*, 355 N.C. 211, 559 S.E.2d 801 (2002).

Here, defendants contend that the trial court properly granted summary judgment because plaintiff voluntarily and knowingly encountered an obvious danger or hazard even though he could have avoided it. In particular, defendants point to two of plaintiff’s actions as constituting contributory negligence as a matter of law: (1) plaintiff’s entering the sunroom and closing the door without checking the lock, and (2) plaintiff’s handling of the window during his attempt to reenter the house.

Any discussion of contributory negligence in a premises liability case must begin with *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 467, 562 S.E.2d 887, 890 (2002), in which the plaintiff was injured when he came into contact with a known, visible hazard—uninsulated power lines—while operating equipment on the defendant’s premises. In upholding the trial court’s denial of motions for a directed verdict and judgment notwithstanding the verdict, the Supreme Court observed: “The existence of contributory negligence is ordinarily a question for the jury; such an issue is rarely appropriate for summary judgment, and only where the evidence establishes a plaintiff’s negligence so clearly that no other reasonable conclusion may be reached.” *Id.* at 479, 562 S.E.2d at 896. The Court “acknowledge[d] the general rule that a person has a legal duty to avoid open and obvious dangers, including contact with [a hazard] he or she knows to be dangerous,” but emphasized that this rule “‘does not mean . . . that a person is guilty of contributory negligence *as a matter of law* if he contacts a known [hazard] regardless of the circumstances and regardless of any precautions he may have taken to avoid

TYBURSKI v. STEWART

[204 N.C. App. 540 (2010)]

the mishap[.]’ ” *Id.* at 479-80, 562 S.E.2d at 896 (emphasis added) (internal citations omitted) (quoting *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 404, 250 S.E.2d 255, 258 (1979)). Consequently, the question before us is whether, considering all of the circumstances and any precautions taken by plaintiff, a reasonable person would have acted as plaintiff did.

We first address defendants’ contention that plaintiff was negligent because he did not check the lock when he entered the sun-room even though he knew of the risk it presented. Our Supreme Court held in *Dennis v. City of Albemarle*, 242 N.C. 263, 268, 87 S.E.2d 561, 565-66 (1955) (quoting 65 C.J.S. Negligence § 120), that an otherwise prudent person is “ ‘not negligent merely because he temporarily forgot or was inattentive to a known danger. To forget or to be inattentive is not negligence unless it amounts to a failure to exercise ordinary care for one’s safety. Regard must be had to the exigencies of the situation, and the circumstances of the particular occasion. Circumstances may exist under which forgetfulness or inattention to a known danger may be consistent with the exercise of ordinary care’ ”

Defendants argue on appeal that *Dennis* only applies in situations where a sudden interruption or distraction diverts a plaintiff’s attention from a known danger. While *Dennis* did explain that a sudden interruption may warrant forgiveness for inattention, subsequent decisions have not limited *Dennis* to those situations.

In *Baker v. Duhan*, 75 N.C. App. 191, 192, 330 S.E.2d 53, 54 (1985), another known hazard case, the plaintiff, who was renting a house and lot from the defendants, suffered an injury to his leg after he stepped into a 10-inch hole on the lot. The plaintiff had known about the hole for a while, but had, over time, forgotten about it. *Id.* In reversing, the trial court’s entry of a directed verdict based on contributory negligence, this Court reasoned:

Defendants contend that, as a matter of law, plaintiff’s prior knowledge of the dangerous condition operates to hold him contributorily negligent. We disagree. *The general rule is that a person will not be held contributorily negligent as a matter of law for forgetting a known danger when, under the circumstances of the particular situation, a person of ordinary prudence would have forgotten or would have been inattentive to the danger because of the surrounding circumstances. Dennis v. Albemarle*, 242 N.C. 263, 87 S.E. 2d 561 (1955). On the facts of this

TYBURSKI v. STEWART

[204 N.C. App. 540 (2010)]

case, we cannot say whether the surrounding circumstances—darkness, a growth of grass around the hole, the lapse of time between plaintiff’s awareness of the hole and his injury—are sufficient to excuse plaintiff’s contributory negligence. We believe, however, that the better view is to allow the jury to decide whether a person of ordinary prudence would have forgotten or would have been inattentive to the unsafe condition because of the surrounding circumstances.

Id. at 193, 330 S.E.2d at 54-55 (emphasis added).

In this case, while plaintiff was aware of the hazard presented by the lock, the question is not whether a reasonably prudent person under similar circumstances would have seen that the sunroom lock was engaged if he had double-checked the lock when entering the sunroom. Rather, the question is whether a reasonably prudent person under similar circumstances would have double-checked the lock at all. *See Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 242, 488 S.E.2d 608, 613 (1997) (reversing grant of summary judgment to defendant based on contributory negligence because “even assuming the plaintiff would have seen the grapes and water on the floor had she looked, a jury question is presented as to whether a reasonably prudent person would have looked down at the floor as she was shopping in the grocery store”), *aff’d per curiam*, 347 N.C. 666, 496 S.E.2d 379 (1998); *Kremer v. Food Lion, Inc.*, 102 N.C. App. 291, 295, 401 S.E.2d 837, 839 (1991) (holding that trial court properly denied directed verdict based on contributory negligence when plaintiff tripped over dog food bags on store’s floor because “in such cases the issue of contributory negligence is not whether the reasonably prudent person would have seen the object had he looked, but whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor” rather than looking ahead where plaintiff was going).

As plaintiff explained in his deposition, he had previously observed the risk, disengaged the lock, and repeatedly used the door over a period of two weeks without any problems. “[T]hese circumstances, when considered together, are such that more than one reasonable inference may be drawn therefrom.” *Dennis*, 242 N.C. at 268-69, 87 S.E.2d at 566. We note that defendants have cited no decisions in which a court found contributory negligence as a matter of law after a plaintiff had taken an action to mitigate a risk, successfully relied on his action for a period of time, and then, perhaps hav-

TYBURSKI v. STEWART

[204 N.C. App. 540 (2010)]

ing become inattentive to the risk, suffered injury from the risk. We conclude that a jury could reasonably find that an ordinarily prudent person in plaintiff's position would also have entered the sunroom without concern for the lock after having disengaged it. The evidence does not so clearly establish plaintiff's negligence that a jury could not reasonably reach a different conclusion.

Next, we consider whether plaintiff's choice of his method of escape constituted contributory negligence. In *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 71, 376 S.E.2d 425, 430 (1989) (quoting *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980)), the Supreme Court held that " 'the existence of contributory negligence does not depend on plaintiff's *subjective* appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an *objective* standard of behavior—the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.' "

The plaintiff in *Collingwood* suffered serious injury when she jumped from her third-floor apartment window to escape a fire in the building. *Id.* at 65, 376 S.E.2d at 426. Her only exit was blocked, and she waited no more than five minutes before jumping. *Id.* at 71, 376 S.E.2d at 429-30. The defendant property owner argued that the plaintiff "behaved unreasonably" because she did not wait for rescue or call for help and that she was, therefore, contributorily negligent. *Id.* at 71, 376 S.E.2d at 429-30. The Supreme Court, affirming this Court's reversal of an order granting summary judgment to the defendant, observed that "[a]lthough some of the evidence tend[ed] to support defendant's claim of contributory negligence, this [was] by no means the only reasonable inference that [could] be drawn from the facts of the case." *Id.*, 376 S.E.2d at 430.

In this case, a jury could have reasonably concluded that plaintiff was not negligent when he attempted to dislodge the window from its track. Plaintiff knew that the food cooking in oil on the stove was creating a fire hazard and that no one else was in the house. He only began working on the window after unsuccessfully attempting to open the door and to flag down help. In his deposition, plaintiff testified that he hoped to reenter the premises without causing any damage to defendants' property. If plaintiff reasonably believed that he could dislodge the window without shattering it, then, arguably, he may have demonstrated even more care than he would have if he had intentionally broken the window by smashing it with a large or heavy object.

TYBURSKI v. STEWART

[204 N.C. App. 540 (2010)]

Defendants essentially contend, however, that because plaintiff hurt himself by taking this approach, he must necessarily have been contributorily negligent. Yet, it is the particular circumstances of the case and the reasonableness of plaintiff's actions—not the mere fact of injury—that determine the issue of contributory negligence. As the Supreme Court stated in *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 68, 414 S.E.2d 339, 345 (1992), “[n]egligence is not presumed from the mere fact of injury.” This rule applies equally to contributory negligence: “[C]ontributory negligence is not to be presumed, but has to be shown by evidence.” *Pinkston v. Connor*, 63 N.C. App. 628, 631, 306 S.E.2d 132, 134 (1983), *aff’d per curiam*, 310 N.C. 148, 310 S.E.2d 347 (1984).

Therefore, we cannot, as defendants urge, presume contributory negligence as a matter of law from the fact that plaintiff was injured when he tried to move the window from its track. Even if defendants are correct in asserting that plaintiff would have fared better by choosing another method of escape, it is for the jury to decide whether such an assertion amounts to 20-20 hindsight or a conclusion plaintiff necessarily should have reached if acting reasonably under the circumstances at the time.

Based on the evidence, we hold that defendants have failed to carry their burden of establishing as a matter of law that plaintiff was contributorily negligent. “ ‘Contradictions or discrepancies in the evidence . . . must be resolved by the jury rather than the trial judge.’ ” *Martishius*, 355 N.C. at 481, 562 S.E.2d at 897 (quoting *Rappaport v. Days Inn of Am., Inc.*, 296 N.C. 382, 384, 250 S.E.2d 245, 247 (1979)). This case presented a genuine issue of material fact as to whether plaintiff was contributorily negligent in not checking the lock before he closed the sunroom door behind him and in trying to dislodge the window in order to escape the sunroom. The trial court, therefore, erred in granting defendants’ motion for summary judgment. We do not reach the issue of defendants’ negligence because defendants moved for and received summary judgment based solely on the issue of contributory negligence.

Reversed.

Judges STROUD and ERVIN concur.

WAR EAGLE, INC. v. BELAIR

[204 N.C. App. 548 (2010)]

WAR EAGLE, INC., PLAINTIFF V. WILLIAM G. BELAIR, AND WIFE, EMMA M. BELAIR,
DEFENDANTS

No. COA09-1516

(Filed 15 June 2010)

1. Appeal and Error—preservation of issues—failure to raise issue in complaint—not procedurally barred

Plaintiff was not procedurally barred from pursuing its appeal even though it did not specifically raise the issue of the breach of the covenant against encumbrances in its complaint. Plaintiff's complaint referred to a general warranty deed, and plaintiff alleged defendants' conduct constituted breach of contract and/or breach of warranty deed.

2. Environmental Law—existing buffer zone violation—actionable encumbrance—breach of contract

The trial court erred in a breach of contract case by failing to recognize the existing buffer zone violation as an actionable encumbrance within the meaning of defendant's covenant against encumbrances.

3. Environmental Law—riparian buffer zone—prior knowledge of violation does not defeat claim

The trial court erred in a breach of contract case by granting summary judgment in favor of defendant grantors based on plaintiff grantee's prior knowledge of the violation of a riparian buffer zone on the pertinent property. A plaintiff's prior knowledge of an encumbrance does not defeat his claim to recover for breach of the covenant against encumbrances contained in a warranty deed. Although plaintiff was entitled to summary judgment on the issue of liability, the case was remanded to the trial court for a determination of the amount of damages.

Appeal by Plaintiff from order entered 3 June 2009 by Judge Yvonne Mims Evans in Superior Court, Catawba County. Heard in the Court of Appeals 27 April 2010.

Morrow Alexander Porter & Whitley, PLLC, by John C. Vermitsky and John F. Morrow, for plaintiff-appellant.

Stacy L. Williams, for defendants-appellees.

WAR EAGLE, INC. v. BELAIR

[204 N.C. App. 548 (2010)]

WYNN, Judge.

A plaintiff's prior knowledge of an encumbrance does not defeat his claim to recover for breach of the covenant against encumbrances contained in a warranty deed.¹ In the present case, the trial court ruled that Plaintiff-grantee could not recover from Defendants-grantors because it had prior knowledge of the violation of a riparian buffer zone on the property. We hold that the trial court erred in granting summary judgment to Defendant-grantors.

Defendants William and Emma Belair owned a waterfront lot on the Catawba County side of Lake Norman. Defendants began construction of a home, but did not proceed beyond building a foundation. In February 2007, Defendants received a letter from the North Carolina Department of Environment and Natural Resources through the Division of Water Quality stating that the house being constructed on the property appeared to be located ten feet into Zone 2 of the riparian buffer. The letter indicated that "[t]he Catawba Riparian Buffer Rule restricts development impacts within a 50-foot wide area beginning at the lake project elevation (in this case the 760 foot elevation of Lake Norman) and extending landward." The Division of Water Quality requested that Defendants respond in writing within 15 days, providing an explanation for the violation, and documentation as to when the lot was platted and recorded.

On 13 March 2007, Defendants listed the lot for sale with Exit Realty South for \$350,000. On 10 May 2007, Defendants submitted a Variance Request Form asking for reconsideration of the 50-foot-set-back limit to the Division of Water Quality. On 21 May 2007, Exit Realty received a fax regarding Defendants' lot from the realtor for Plaintiff, War Eagle, Inc. On the fax cover sheet was written "please read our concerns on the note—attached from the purchaser." The attachment, an email from Mike Hamby, the owner of War Eagle, Inc., stated: "We are ready to make an offer. Here are our conclusions regarding this property. 1—The variance was not followed up for the structure being 3 feet over the designated allowed building area, which means it has NOT been allowed. . . ."

That same day, Plaintiff executed an Offer to Purchase and Contract—Vacant Lot/Land for a purchase price of \$282,500. Defendants received a response on 4 June 2007 from the Division of Water Quality requesting additional information before the division

1. *Investments, Inc. v. Enterprises, Ltd.*, 35 N.C. App. 622, 626, 242 S.E.2d 176, 179, *disc. review denied*, 295 N.C. 90, 244 S.E.2d 260 (1978).

WAR EAGLE, INC. v. BELAIR

[204 N.C. App. 548 (2010)]

could proceed with its review of the Variance Request Form. The Division of Water Quality requested a response in writing within three weeks. The letter stated that a failure to respond would indicate that the variance request had been withdrawn.

Defendants signed the Offer to Purchase and Contract on 7 June 2007. According to Defendant William Belair, at the time the contract was signed, it was his belief that everyone who was a party to the transaction was aware of the violation of the riparian buffer rule, and that the buyer was aware the foundation would have to be removed to prevent the violation. At the closing on 14 June 2007, Defendants tendered to Plaintiff a General Warranty Deed containing the following language:

The Grantor covenants with the Grantee, that Grantor is seized of the premises in fee simple, has the right to convey the same in fee simple, that title is marketable and free and clear of all encumbrances, and that Grantor will warrant and defend the title against the lawful claims of all persons whomsoever, other than the following exceptions:

Ad Valorem Taxes; Any Restrictions, Easements and Rights of Way of record.

The Deed was recorded in the Catawba County Registry on 26 June 2007.²

On 2 July 2008, the Division of Water Quality sent a letter to Defendants and Plaintiff noting a continuing violation of the riparian buffer; requesting additional information as to why the violation occurred; demanding that the removal of the foundation and existing walls and restoration of the buffer to its natural condition; and noting “additional impacts” that had been observed since the last inspection including removal of vegetation in Zone 1 of the buffer. The letter gave the parties until 29 August 2008 to correct the violation without incurring penalties.

On 4 September 2008, Defendants received a letter from Plaintiff’s counsel requesting \$15,510 “to cover the cost of demolishing the basement walls, haul away debris, fill and compact a hole, and the anticipated expense of planting five trees.” On 18 September 2008, Plaintiff brought this action alleging breach of contract, fraud, and punitive damages. After discovery, on 8 October 2008, Plaintiff gave

2. Defendants do not argue that the violation of the riparian buffer zone was included in the exceptions listed in the deed.

WAR EAGLE, INC. v. BELAIR

[204 N.C. App. 548 (2010)]

notice of dismissal without prejudice on the claims of fraud and punitive damages. On 1 December 2008, the trial court granted Defendants' request to have the suit transferred from Forsyth County to Catawba County.

Thereafter, Plaintiffs and Defendant, respectively, filed Rule 56 Motions for Summary Judgment. On 3 June 2009, the trial court issued an order ruling on the summary judgment motions, which included findings of fact and conclusions of law. The trial court stated its conclusions of law as follows:

1. The encumbrance in question is a zoning ordinance imposed by the police power of the State of North Carolina and Catawba County, and the North Carolina Supreme Court has found that a [restriction on use which may be made of land, or on its transfer, which is imposed by statute or ordinance enacted pursuant to police power, is not an "encumbrance" within [the meaning of a] "covenant against encumbrances." Fritts v. Gerukos, 273 N.C. 116, 159 S.E.2d 536 (1968).
2. The failure of the defendants to either get the variance request granted or to demolish the foundation prior to closing did not preclude them from delivering marketable title to the plaintiff.
3. The undisputed email written by the plaintiff reveals that he had knowledge of a violation and the variance request prior to entering into an agreement to purchase the property.
4. The Court concludes after a review of the record that said buffer zone violation was an encumbrance as defined by the North Carolina Supreme Court that did not affect the defendant's ability to convey marketable title to the plaintiff. Furthermore, it was the type of encumbrance that the North Carolina Supreme Court has ruled bars plaintiff of recovery, if plaintiff had notice of the violation prior to the purchase of the property.

Accordingly, the trial court denied Plaintiff's Motion for Summary Judgment and granted Defendants' Motion for Summary Judgment.

Preliminarily we comment on the trial court's entry of an order containing detailed findings of fact and conclusions of law in a case decided upon a summary judgment motion. *See* N.C. Gen. Stat. § 1A-1, Rule 56 (2009). The purpose of the entry of findings of fact by a trial court is to resolve contested issues of fact. This is not appropriate when granting a motion for summary judgment, where the basis of the judgment is "that there is no genuine issue as to any ma-

WAR EAGLE, INC. v. BELAIR

[204 N.C. App. 548 (2010)]

terial fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c); *see also Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 164-65 (1975) (“If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper. There is no necessity for findings of fact where facts are not at issue, and summary judgment presupposes that there are no triable issues of material fact.”). By making findings of fact on summary judgment, the trial court demonstrates to the appellate courts a fundamental lack of understanding of the nature of summary judgment proceedings. We understand that a number of trial judges feel compelled to make findings of fact reciting those “uncontested facts” that form the basis of their decision. When this is done, any findings should clearly be denominated as “uncontested facts” and not as a resolution of contested facts. In the instant case, there was no statement that any of the findings were of “uncontested facts.”

Turning now to Plaintiff’s appeal, we address the following issues: (I) whether Plaintiff should be barred on procedural grounds from pursuing its appeal; (II) whether the trial court erred in failing to recognize the existing buffer zone violation as an actionable encumbrance within the meaning of Defendant’s covenant against encumbrances; and (III) whether the trial court erred in concluding that Plaintiff’s actual knowledge of the encumbrance defeats its claim of Defendants’ breach of the covenant against encumbrances.

I.

[1] Defendants initially contend that this Court should dismiss Plaintiff’s appeal as procedurally barred. Defendants cite *Goodrow v. Martin, Inc.*, 6 N.C. App. 599, 170 S.E.2d 506 (1969), for the proposition that a plaintiff cannot proceed on a cause of action for breach of the covenant against encumbrances unless the complaint alleges such a breach. Here, Plaintiff did not specifically raise the issue in its complaint of the breach of the covenant against encumbrances. Defendants contend that Plaintiff should therefore be precluded from raising the issue of breach of that covenant on appeal.

In *Goodrow*, this Court held that a plaintiff’s complaint was insufficient where it lacked any allegation “as to the covenant against encumbrances in the deed or any alleged breach thereof.” *Id.* at 602, 170 S.E.2d at 507. In the present case, however, Plaintiff’s complaint refers to a General Warranty Deed. By definition, a warranty deed contains covenants concerning the quality of the title it conveys. *See Black’s Law Dictionary* 1589 (6th ed. 1990). Moreover, Plaintiff here

WAR EAGLE, INC. v. BELAIR

[204 N.C. App. 548 (2010)]

alleged that the conduct of Defendants constituted breach of contract and/or breach of warranty deed. These factors distinguish this case from *Goodrow*.

Defendants also rely on *Baker v. Rushing*, 104 N.C. App. 240, 246, 409 S.E.2d 108, 111 (1991), and *Gilbert v. Thomas*, 64 N.C. App. 582, 585, 307 S.E.2d 853, 855-56 (1983), for the principle that a movant is not permitted to raise new issues in support of a motion for summary judgment on appeal. Defendants argue that Plaintiff did not present its breach of the covenant against encumbrances claim below. There is no merit to this argument. Plaintiff argued at the 18 May 2009 hearing that Defendants had breached the covenant against encumbrances contained in their warranty deed. The trial court in its order granting Defendants summary judgment ruled that the riparian buffer violation was not an actionable encumbrance. Because Plaintiff properly raises the issue of the accuracy of that ruling on appeal, we address the merits of Plaintiff's appeal.

II.

[2] We next address the issue of whether the trial court's order of summary judgment failed to recognize the existing buffer zone violation as an actionable encumbrance within the meaning of Defendant's covenant against encumbrances.

In its conclusions supporting summary judgment,³ the trial court cited *Fritts v. Gerukos*, 273 N.C. 116, 159 S.E.2d 536 (1968), wherein our Supreme Court explained that an ordinance such as the riparian buffer zone at issue here does not itself constitute an encumbrance within the meaning of a covenant against encumbrances:

A restriction upon the use which may be made of land, or upon its transfer, which is imposed by a statute or ordinance enacted pursuant to the police power, such as a zoning ordinance or an ordinance regulating the size of lots, fixing building lines or otherwise regulating the subdivision of an area into lots, is not an encumbrance upon the land within the meaning of a covenant against encumbrances or a contract or option to convey the land free from encumbrances, being distinguishable in this respect from restrictions imposed by a covenant in a deed.

Id. at 119, 159 S.E.2d at 539.

3. A party is entitled to summary judgment when there is no genuine issue of material fact and that party is entitled to a judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). We review the denial or grant of a motion for summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

WAR EAGLE, INC. v. BELAIR

[204 N.C. App. 548 (2010)]

Following *Fritts*, this Court in *Wilcox v. Pioneer Homes, Inc.*, 41 N.C. App. 140, 254 S.E.2d 214 (1979), drew a valuable distinction between an encumbrance action brought on the basis of the ordinance itself and an encumbrance action brought on the basis of an existing violation of the ordinance. Noting a split of authority among the jurisdictions that have considered the issue, this Court stated:

The majority of the jurisdictions have held that, although the existence of a public restriction on the use of real property is not an encumbrance rendering the title to the real property unmarketable, an existing violation of such an ordinance is an encumbrance within the meaning of a warranty against encumbrances.

Id. at 143, 254 S.E.2d at 215. The *Wilcox* Court held that the violation of the ordinance “constitute[d] an encumbrance within the meaning of the covenant against encumbrances contained in the plaintiffs’ warranty deed.” *Id.* at 143, 254 S.E.2d at 216.

In the present case, the trial court ruled correctly, on the basis of *Fritts*, that the ordinance itself did not constitute an encumbrance. However, Plaintiff’s encumbrance action was based on the existing violation of the ordinance, which under *Wilcox* did constitute an encumbrance. *See id.* Thus, the trial court’s conclusion that the “buffer zone violation was an encumbrance . . . that did not affect the defendants’ ability to convey marketable title to the plaintiff” is a *non sequitur*. Following *Wilcox*, we hold that the existing buffer zone violation constituted an actionable encumbrance within the meaning of Defendants’ covenant against encumbrances.

III.

[3] Finally, we address the dispositive issue of whether the trial court erred in concluding that Plaintiff’s actual knowledge of the encumbrance defeats its claim of Defendants’ breach of the covenant against encumbrances. For the reasons given in *Investments, Inc. v. Enterprises, Ltd.*, 35 N.C. App. 622, 242 S.E.2d 176, we hold that the trial court erred by granting summary judgment in favor of Defendants.

In their brief, Defendants argue that Plaintiff’s prior knowledge of the encumbrance should nevertheless defeat its claim. Defendants rely on *Waters v. Phosphate Corp.*, 310 N.C. 438, 440, 312 S.E.2d 428, 431 (1984), for the rule that visible burdens on the land are generally not covered by a covenant against encumbrances. Defendants

WAR EAGLE, INC. v. BELAIR

[204 N.C. App. 548 (2010)]

point out that the foundation of the unfinished house was visible, open, and obvious.

Defendants fail to realize that the rule discussed in *Waters* applies only to public easements, not to ordinances such as the riparian buffer at issue here. *Id.* at 441, 312 S.E.2d at 431; *see also Hawks v. Brindle*, 51 N.C. App. 19, 24, 275 S.E.2d 277, 281 (1981). The visible burden rule, moreover, applies only to visible burdens on the land. There is no evidence in the record that the violation here could be seen through an inspection of the property.

Instead, this issue was resolved by this Court in *Investments, Inc. v. Enterprises, Ltd.* In that case, we held that “[e]ven the grantee’s actual knowledge and record notice of the existence of an encumbrance do not constitute a defense to a grantee’s action to recover damages for grantor’s breach of the covenant against encumbrances.” *Investments, Inc.*, 35 N.C. App. at 626, 242 S.E.2d at 179. We there explained our reasoning thus:

Acceptance of this argument would render completely meaningless all of the covenants in defendants’ deed. If defendants did not mean to be bound by their covenants, they should not have included them in their deed. Execution and delivery of the deed containing full covenants established the extent of their obligations thereunder.

Id. at 627, 242 S.E.2d at 179. (citing *Gerdes v. Shew*, 4 N.C. App. 144, 150-51, 166 S.E.2d 519, 524 (1969)).

The trial court here ruled that the buffer zone violation was “the type of encumbrance that the North Carolina Supreme Court has ruled bars plaintiff of recovery, if plaintiff had notice of the violation prior to the purchase of the property.” This conclusion is not consistent with our holding in *Investments, Inc.* We therefore hold that the trial court erred in concluding that Plaintiff’s prior knowledge of the encumbrance defeats its claim.

In conclusion, we note that Plaintiff asks us not merely to reverse the grant of summary judgment for Defendants but also to instruct the trial court to grant summary judgment to Plaintiff. Based on the analysis above, we hold that Plaintiff is entitled to summary judgment on the issue of liability. But the record before us is not sufficient to determine what amount Plaintiff is entitled to by way of damages. We therefore remand for trial on the issue of Plaintiff’s damages.

IN RE S.N.W.

[204 N.C. App. 556 (2010)]

Reversed and Remanded.

Judge CALABRIA and STEELMAN concur.

IN THE MATTER OF: S.N.W. & A.Z.W.

NO. COA10-119

(Filed 15 June 2010)

1. Appeal and Error— late notice of appeal—treated as petition for certiorari

An appeal in a termination of parental rights case was treated as a petition for a writ of *certiorari* due to the importance of the issue even though the notice of appeal was one day late.

2. Termination of Parental Rights— representation of parent by counsel—remanded for further determination

A termination of parental rights order was remanded for a determination by the trial court regarding efforts by respondent's counsel to contact and adequately represent respondent at the termination hearing and whether respondent is entitled to appointment of counsel in a new termination hearing.

Appeal by Respondent from order entered 14 September 2009 by Judge Richlyn D. Holt in Haywood County District Court. Heard in the Court of Appeals 25 May 2010.

Ira L. Dove, for Haywood County Department of Social Services, Petitioner-Appellee.

Pamela Newell, for Guardian ad Litem.

Joyce L. Terres, for Respondent-Appellant.

BEASLEY, Judge.

Respondent (father) appeals from the trial court order terminating his parental rights to the minor children S.N.W. (hereinafter Sarah), born in 2003, and A.Z.W. (hereinafter Adam¹), born in 2005. Respondent contends (1) he received ineffective assistance of coun-

1. Pseudonyms are used to protect the identity of the minor children.

IN RE S.N.W.

[204 N.C. App. 556 (2010)]

sel since his attorney did not participate in the termination hearing; and (2) the trial court failed to take proper evidence where it mostly relied on documentary evidence and it improperly deemed the allegations of the termination petition to be admitted based on Respondent's failure to file an answer. After careful consideration, we remand for further findings regarding Respondent's counsel's efforts to contact Respondent and counsel's ability to represent Respondent.

The Haywood County Department of Social Services (DSS) has been involved with this family since 2005. In August 2005, DSS began providing in-home protective services due to complaints of domestic violence, substance abuse, inappropriate supervision of the children, and injurious environment. The children were removed from mother and Respondent's home in 2006 due to substance abuse and domestic violence, as well as criminal activity by mother and Respondent. On 23 January 2007 DSS filed juvenile petitions and on 21 February 2007 the children were adjudicated neglected and dependent.

On 3 February 2009 DSS filed petitions to terminate mother and Respondent's parental rights alleging as grounds for termination: (1) neglect, N.C. Gen. Stat. § 7B-1111(a)(1); (2) wilfully leaving the children in foster care for more than twelve months without making reasonable progress to correct the conditions which led to the children's removal from the home, N.C. Gen. Stat. § 7B-1111(a)(2); and (3) willful failure to pay a reasonable portion of the cost of care of the children. An additional ground was alleged with regard to Sarah, that Respondent failed to establish paternity or otherwise to legitimate the child, N.C. Gen. Stat. § 7B-1111(a)(5).

On 25 February 2009, the trial court entered an order assigning Mark Jenkins as counsel for Respondent. The termination hearing was initially scheduled to be held on 21 and 22 April 2009, but on 21 April 2009, the matter was continued to June 2009, specifically because "Parents needs [sic] time to prepare with counsel." The matter was continued twice more, first to July, and then to August.

The matter came on for hearing on 25 August 2009. Respondent was not present at calendar call. The termination matter for the children's mother was continued to a later date. The following exchange took place between the trial court and Respondent's trial counsel:

[DEFENSE COUNSEL]: And—and my—report to the Court on that, Your Honor, is I have had, since my appointment in June, no contact other than one phone message from [respondent father]. I tried to return it and have not had any further—

IN RE S.N.W.

[204 N.C. App. 556 (2010)]

THE COURT: What is his name, Shannon D. [W.]?

[DEFENSE COUNSEL]: Yes, uh-huh.

THE COURT: Is Shannon [W.] here, Shannon D. [W.]? You've only one contact, and he's not kept up with you?

[DEFENSE COUNSEL]: He's not kept with me, Your Honor. I have not—

THE COURT: What I'm gonna do is—is not—not let you out of the case, but allow you not to participate.

[DEFENSE COUNSEL]: And I understand that, Your Honor.

THE COURT: And we'll note that the father has not been in communication with Mr. Jenkins.

The termination hearing proceeded in the afternoon, without Respondent counsel' participation. The hearing lasted approximately fifteen minutes. DSS presented evidence through the testimony of foster care supervisor Paula Watson. At DSS's request, the trial court took judicial notice of the termination petitions and the underlying adjudication order.

The trial court determined that DSS had proven each of the grounds alleged in the termination petitions, and further determined that termination of Respondent's parental rights is in the best interests of the children. Based on its findings of fact and conclusions of the law, the trial court ordered that Respondent's parental rights be terminated. From the adjudication and dispositions orders entered, Respondent appeals.

[1] As a preliminary matter, we note the notice of appeal contained in the record on appeal was filed on 15 October 2009 from the trial court's orders entered 14 September 2009, one day past the thirty day appeal period. N.C.R. App. P. 3(a). Due to the important issues involved in a termination of parental rights matter, we elect to treat Respondent's appeal as a petition for writ of certiorari, and we grant the writ for the purposes of addressing the claims raised by Respondent. N.C.R. App. P. 21(a) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action").

[2] Respondent first contends he was denied effective assistance of counsel when the trial court allowed his trial counsel to re-

IN RE S.N.W.

[204 N.C. App. 556 (2010)]

frain from participating in the termination hearing. We remand for further findings.

“Parents have a ‘right to counsel in all proceedings dedicated to the termination of parental rights.’” *In re L.C.*, 181 N.C. App. 278, 282, 638 S.E.2d 638, 641 (2007) (quoting *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996)); N.C. Gen. Stat. § 7B-1101.1 (2009). “This statutory right includes the right to effective assistance of counsel.” *In re Dj.L.*, 184 N.C. App. 76, 84, 646 S.E.2d 134, 140 (2007) (citing *In re L.C.*, 181 N.C. App. at 282, 638 S.E.2d at 641; *In re Oghenekevebe*, 123 N.C. App. at 436, 473 S.E.2d at 396). “To prevail in a claim for ineffective assistance of counsel, respondent must show: (1) [the] counsel’s performance was deficient or fell below an objective standard of reasonableness; and (2) [the] attorney’s performance was so deficient [he] was denied a fair hearing.” *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005) (citing *In re Oghenekevebe*, 123 N.C. App. at 436, 473 S.E.2d at 396).

Under these unique factual circumstances, the trial court should have inquired further about Respondent counsels’ efforts: (1) to contact Respondent; (2) to protect Respondent’s rights; and (3) to ably represent Respondent. After inquiry, if the trial court determined that counsel was indeed ineffective, the trial court should have appointed new counsel, despite the fact that no motion to withdraw was made. *See State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980) (“[a] trial court is constitutionally required to appoint substitute counsel whenever representation by counsel originally appointed would amount to denial of defendant’s right to effective assistance of counsel . . .”).

Upon review of the record and transcripts, we are unable to determine that the attorney assigned in the termination matter made adequate efforts to communicate and/or consult with Respondent. The trial court made no extended inquiry of trial counsel’s efforts to communicate with Respondent after counsel stated his attempt to return a phone call from Respondent was unsuccessful. No information is provided regarding how many phone calls trial counsel may have made, whether he sent any written communication to Respondent, or whether he sought help in contacting Respondent through another party, such as DSS or the Department of Corrections. Evidence in the record indicates that Respondent continued visitation with the children until the beginning of March 2009, and that he was incarcerated for a period of time during that month. After he was

IN RE S.N.W.

[204 N.C. App. 556 (2010)]

released, DSS conducted a home visit with Respondent on 5 April 2009. Therefore, it is clear that DSS at least was able to communicate and meet with Respondent in the period after the termination petition was filed and before the hearing was held.

Respondent further argues that trial counsel's fee application is evidence of a lack of attention paid to the case by counsel. The only fee application included in the record on appeal seeks fees for the period from 24 April 2009 to 26 August 2009. The application reflects that trial counsel spent a total of 1.1 hours on the case, including 0.16 for time spent in court, 0.39 for time spent waiting in court, and 0.55 for time spent out of court. Although there is certainly a possibility that trial counsel spent more time on the case between his appointment on 25 February 2009 and 23 April 2009, there is no information in the record. We note that the termination hearing was postponed on 21 April 2009 specifically to allow Respondent time to prepare with this counsel. Given that four more months elapsed before the termination hearing was held, it is troubling that trial counsel spent only 0.55 hours during that time in advance preparation of the termination hearing. Despite whether that limited amount of time was spent on preparation or on attempts to communicate with Respondent, it does not reflect an adequate amount of time given the lengthy history of this case.

Moreover, we note that Respondent had more than one attorney assigned to him in this case, and that the termination hearing specifically was continued several times. It is not inconceivable that Respondent may have been confused about what was required of him with regard to the termination proceedings or when he needed to appear in court. The lack of information in the record or transcript regarding counsel's attempts to contact his client, along with the lack of representation at the brief fifteen-minute hearing, precludes us from determining whether Respondent received effective assistance of counsel, and if he was denied a fair hearing.

Prudence requires that we take this opportunity to comment on the trial court's failure to ensure Respondent's right to effective assistance of counsel at trial. It is well established that attorneys have a responsibility to advocate on the behalf of their clients. *See State v. Staley*, 292 N.C. 160, 161, 232 S.E.2d 680, 682 (1977); *Thelen v. Thelen*, 53 N.C. App. 684, 692, 281 S.E.2d 737, 741 (1981) ("An attorney owes to his client the duty to employ his best efforts in the prosecution of the litigation entrusted to him.").

IN RE S.N.W.

[204 N.C. App. 556 (2010)]

As discussed above, the trial court allowed counsel Mark Jenkins to remain involved in the case, while not requiring him to be an active participant. We are concerned that the trial court, in allowing Respondent's counsel to "not participate", alleviated Mr. Jenkins of his fundamental duty to advocate on behalf of Respondent, thereby denying Respondent effective assistance of counsel. We are aware that a trial court may terminate a parent's parental rights, after a hearing, even if the parent failed to answer the petition and is not present at the hearing. *See* N.C. Gen. Stat. § 7B-1107 (2009). Further, we recognize that "a lawyer cannot properly represent a client with whom he has no contact." *Dunkley v. Shoemate*, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999). Therefore, a finding of ineffective assistance of counsel will generally not be made where the purported shortcomings of counsel were caused by the party. *See In re Bishop*, 92 N.C. App. 662, 666, 375 S.E.2d 676, 679 (1989) ("Where the lack of preparation for trial is due to a party's own actions, the trial court does not err in denying a motion to continue."). However, procedural safeguards, including the right to counsel, must be followed to ensure the "fundamental fairness" of termination proceedings. *In re K.N.*, 181 N.C. App. 736, 741, 640 S.E.2d 813, 817 (2007) (order of termination vacated where issues of lack of proper notice were raised, the termination hearing lasted twenty minutes, and counsel was allowed to withdraw, leaving the respondent-mother with no representation at the termination hearing).

In conclusion, we determine that the record before us raises questions as to whether Respondent was afforded with the proper procedures to ensure that his rights were protected during the termination of his parental rights to the minor children. We are mindful that the record is replete with evidence which casts doubt on Respondent's ability to parent. Nonetheless, Respondent is entitled to procedures which provide him with fundamental fairness in this type of action. *See K.N.*, 181 N.C. App. at 737, 640 S.E.2d at 814. Accordingly, we remand for determination by the trial court regarding efforts by Respondent's counsel to contact and adequately represent Respondent at the termination of parental rights hearing and whether Respondent is entitled to appointment of counsel in a new termination of parental rights proceeding.

Since we have determined that Respondent may not have received a fair hearing and the matter is remanded for a new hearing, we need not address Respondent's second argument regarding the propriety of the trial court relying on documentary evidence or deem-

STATE v. PRINGLE

[204 N.C. App. 562 (2010)]

ing the allegations of the petition admitted for Respondent's failure to file an answer.

Remanded.

Chief Judge MARTIN and Judge HUNTER, Robert C. concur.

STATE OF NORTH CAROLINA v. DWAYNE MOESHUN PRINGLE, DEFENDANT

No. COA09-1246

(Filed 15 June 2010)

Jury— instructions—conspiracy—no error

The trial court did not commit error, much less plain error, in its instructions to the jury on the charge of conspiracy by not specifically naming the individual with whom defendant was alleged to have conspired. The trial court's instruction was in accord with the material allegations in the indictment and the evidence presented at trial.

Appeal by defendant from judgments entered 27 February 2009 by Judge Lindsay R. Davis in Guilford County Superior Court. Heard in the Court of Appeals 14 April 2010.

Attorney General Roy Cooper, by David L. Elliot, Director, Victims and Citizens Services, for the State.

David L. Neal for defendant-appellant.

HUNTER, Robert C., Judge.

Dwayne Moeshun Pringle ("defendant") appeals from judgments entered 27 February 2009 after a jury found him guilty of: (1) conspiracy to commit robbery with a dangerous weapon and (2) robbery with a dangerous weapon. After careful review, we find no error.

Background

The evidence at trial tended to show that Officer John Ludemman ("Officer Ludemman") of the Greensboro Police Department was on duty the night of 4 June 2008 as part of a "robbery suppression team" that was conducting surveillance in areas that had recently experi-

STATE v. PRINGLE

[204 N.C. App. 562 (2010)]

enced an increase in commercial robberies. Shortly after midnight, Officer Ludemman saw a group of “young black males” standing in a dark area next to the Great Stops gas station. Officer Ludemman pulled his car into a nearby parking lot and continued to observe the men. Once there were no customers inside the gas station, Officer Ludemman saw the three men tie something over their faces and run inside the store. Officer Ludemman could not see the cash register area, but he saw the men moving around inside the gas station, placing items into a backpack. Dale Coggeshall (“Mr. Coggeshall”), the only clerk on duty at the gas station during the robbery, testified that the men took cigars as well as cash from a safe, a cash register, and Mr. Coggeshall’s wallet. A handgun was brandished during the robbery.

Officer Ludemman began pursuing the men after they exited the gas station and subsequently apprehended them at the Hilton Place apartment complex. Defendant was one of the three men arrested. Upon searching the complex, Officer Ludemman discovered a 9mm pistol. The video tape of the robbery established that defendant was the person who displayed the gun during the robbery.

On 7 July 2008, defendant was indicted on charges of conspiracy to commit robbery with a dangerous weapon and robbery with a dangerous weapon. Defendant filed a motion in *limine* to prevent Mr. Coggeshall from testifying regarding his identification of defendant, which was granted after a hearing.¹ Defendant claims that Mr. Coggeshall’s trial testimony changed in some respects from his hearing testimony, but admits that his testimony was “consistent . . . with regard to the basic outlines of the robbery.”

On 27 February 2009, defendant was found guilty by a jury of both charges. The trial court determined that defendant was a record level two offender for purposes of sentencing and defendant was sentenced to 67 to 90 months imprisonment for the robbery conviction, and 23 to 37 months imprisonment for the conspiracy conviction. Defendant’s sentence was in the presumptive range and defendant was given credit for time served prior to entry of the judgment.

Analysis

Defendant’s appellate counsel states he is “unable to identify an issue to support a meaningful argument for relief on appeal” and “finds the appeal to be without merit.” Counsel requests this Court to

1. Defendant’s motion in *limine* is not contained in the record.

STATE v. PRINGLE

[204 N.C. App. 562 (2010)]

“fully examine the record on appeal for possible prejudicial error and to determine whether counsel overlooked any issue” In accord with the holdings of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh’g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), defense counsel wrote a letter to defendant on 4 November 2009, advising defendant of counsel’s inability to find “an issue to raise on appeal that [he] thought had merit[,]” and of counsel’s request for this Court to conduct an independent review of the record. Defense counsel informed defendant that he could file his own brief directly with the Court and offered his assistance should defendant choose to do so.

Defense counsel has substantially complied with the requirements of *Anders* and *Kinch*; accordingly, we must fully “review the record for any prejudicial error.” *Kinch*, 314 N.C. at 101, 331 S.E.2d at 666. Defendant’s appellate counsel directs our attention to three potential issues: (1) whether the trial court committed reversible error when it denied defendant’s motion to strike the trial testimony of Mr. Coggeshall because his testimony was somewhat altered from his testimony at the hearing on defendant’s motion in *limine*; (2) whether the trial court committed reversible error by failing to sentence in the mitigated range; and (3) whether the trial court committed plain error in its instructions to the jury on the charge of conspiracy by not specifically naming the individual with whom defendant was alleged to have conspired.² Defendant has not raised any arguments on his own behalf. After careful review of the entire record and issues identified by counsel, we are unable to find any error at the trial or sentencing phase of this case; however, because the third issue brought to our attention by defense counsel is not wholly frivolous, we will address the issue.

The indictment charging defendant with conspiracy to commit robbery with a dangerous weapon states:

The jurors for the State upon their oath present that on or about the date of offense shown above and in the county named above the defendant named above unlawfully, willfully and feloniously did conspire with Jimon Dollard and another unidentified male to

2. We note that this case differs from *State v. Grady*, 136 N.C. App. 394, 398, 524 S.E.2d 75, 78, *appeal dismissed and disc. review denied*, 352 N.C. 152, 544 S.E.2d 232 (2000), where this Court held that defense counsel subjects defendant’s appeal to dismissal where counsel argues an assignment of error and concurrently requests a “partial” *Anders* review. Here, defense counsel raised potential issues, as encouraged by the Supreme Court in *Anders*, but explicitly stated that he found no merit in any of the issues and requested a full *Anders* review.

STATE v. PRINGLE

[204 N.C. App. 562 (2010)]

commit the felony of Robbery with a Dangerous Weapon (North Carolina General Statute 14-87) against Dale Coggeshall and the Great Stops Convenience Store on West Market Street, Greensboro, North Carolina.

During its charge to the jury regarding the crime of conspiracy to commit robbery with a dangerous weapon, the trial court stated:

The defendant has been charged with feloniously conspiring to commit robbery with a dangerous weapon. Again, a firearm is a dangerous weapon. For you to find the defendant guilty of this offense the State must prove three things beyond a reasonable doubt.

First, that the defendant and at least one other person entered into an agreement.

Second, that the agreement was to commit robbery with a dangerous weapon, the elements of which have already [been] described to you.

And third, that the defendant and such other person or persons intended that the agreement be carried out at the time it was made.

. . . .

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant agreed with at least one other person to commit robbery with a dangerous weapon and that the defendant and such other person or persons intended at the time the agreement was made that it would be carried out, then it would be your duty to return a verdict of guilty.

Defense counsel points out that the jury instructions do not specifically name Jimon Dollard as the person with whom defendant conspired; rather, the trial court instructed that the jury could find defendant guilty of the conspiracy offense if it determined that defendant had conspired “with at least one other person to commit robbery with a dangerous weapon” Defense counsel did not object to the trial court’s instruction. Accordingly, we review the instruction for plain error. “In deciding whether a defect in the jury instruction constitutes ‘plain error,’ the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury’s finding of guilt.” *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983).

STATE v. PRINGLE

[204 N.C. App. 562 (2010)]

It is well established that where an indictment charging a defendant with conspiracy names specific individuals with whom the defendant is alleged to have conspired and the evidence at trial shows the defendant may have conspired with persons other than those named in the indictment, it is error for the trial court to instruct the jury that it may find the defendant guilty of conspiracy based upon an agreement with persons not named in the indictment. *See State v. Mickey*, 207 N.C. 608, 610-11, 178 S.E. 220, 221-22 (1935) (holding the trial court erred in instructing the jury that it may find the defendant guilty if the jury found the defendant had conspired with the two co-conspirators named in the indictment, “or both of them, or others,” where evidence tended to show a conspiracy between the defendant and some person other than the named co-conspirators); *State v. Minter*, 111 N.C. App. 40, 42-43, 432 S.E.2d 146, 148 (holding the trial court erred when it instructed the jury that it may find the defendant guilty of conspiracy if the jury found the defendant “agreed with at least one other person” where the indictment charged the defendant with conspiring with a single named individual and the evidence tended to show the defendant “may have conspired with a number of persons, not just the named co-conspirator, to commit an unlawful act”), *cert. denied*, 335 N.C. 241, 439 S.E.2d 158 (1993).

However, our Supreme Court has found no error where the trial court instructed the jury that it may find a defendant guilty of conspiracy without limiting the instruction to only those persons named in the indictment. *State v. Johnson*, 337 N.C. 212, 223-24, 446 S.E.2d 92, 99 (1994). In *Johnson*, the indictment stated that the defendant conspired with Debbie Hemmert and Rebecca Hill; however, the trial court did not include the women’s names in its charge to the jury. *Id.* at 224, 446 S.E.2d at 99. There, the evidence presented at trial tended to establish that the defendant conspired with only those persons named in the indictment. *Id.* Furthermore, the co-conspirators testified for the State, and their testimony corroborated the other’s account of the conspiracy. *Id.* We interpret *Johnson* to mean that during jury instructions the trial court need not specifically name the individuals with whom defendant was alleged to have conspired so long as the instruction comports with the material allegations in the indictment and the evidence presented at trial. In *Mickey* and *Minter*, unlike in *Johnson* and the present case, the evidence at trial tended to show that the defendant may have conspired with other individuals not named in the indictment. *Mickey*, 207 at 610-11, 178 S.E. at 221-22; *Minter*, 111 N.C. App. at 42-43, 432 S.E.2d at 148. The trial

STATE v. BROWN

[204 N.C. App. 567 (2010)]

court then instructed the jury that it could find defendant guilty if it determined that defendant had conspired with other people not named in the indictment. *Id.* The instructions, therefore, were erroneous because they sought to “put the defendant on trial for an offense additional to that named in the bill of indictment.” *Minter*, 111 N.C. App. at 43, 432 S.E.2d at 148.

The indictment in the case *sub judice* alleged that defendant conspired with “Jimon Dollard and another unidentified male” and the trial court instructed the jury that it could find defendant guilty of conspiracy if the jury found defendant conspired with “at least one other person.” The evidence at trial tended to show that defendant and two other men entered into a conspiracy to commit robbery with a dangerous weapon. One of the other men was specifically identified by the testifying officers as “Jimon Dollard,” the second suspect arrested by officers after they pursued the three men seen robbing the gas station. The third man evaded capture and was never identified. Here, as in *Johnson*, the trial court’s instruction did not limit the conspiracy to only those individuals named in the indictment. Nevertheless, the trial court’s instruction was in accord with the material allegations in the indictment and the evidence presented at trial. Consequently, we find no error, much less plain error, in the trial court’s instruction.

No Error.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA v. THOMAS F. BROWN

No. COA09-1213

(Filed 15 June 2010)

**Constitutional Law— Miranda warning—voluntary waiver—
motion to suppress properly denied**

The trial court in a trafficking in cocaine case did not err in denying defendant’s motion to suppress statements made to law enforcement. The evidence supported the trial court’s findings of fact, which supported its conclusion of law, that defendant’s waiver of his *Miranda* rights was made freely, voluntarily, and understandingly.

STATE v. BROWN

[204 N.C. App. 567 (2010)]

Appeal by defendant from order dated 26 March 2009 by Judge Jack A. Thompson in Johnston County Superior Court. Heard in the Court of Appeals 29 April 2010.

Attorney General Roy Cooper, by Assistant Attorney General LaToya B. Powell, for the State.

Center for Death Penalty Litigation, by David Weiss, for defendant.

BRYANT, Judge.

On 23 July 2007, a Johnston County grand jury indicted defendant Thomas F. Brown for trafficking in cocaine by possession and trafficking in cocaine by transportation. Defendant moved to suppress his statements to law enforcement, which motion the trial court denied by order dated 26 March 2009. Defendant then pled no contest to trafficking in cocaine by possession and the trial court sentenced him to 35 to 42 months in the Department of Correction. Defendant appeals. As discussed herein, we affirm.

Facts

On 19 June 2007, defendant was a passenger in a car pulled over for speeding by a State Highway Patrol trooper. When the trooper approached the car, he smelled marijuana and saw a green leafy substance on defendant's shirt. The trooper searched defendant and found a bag of white powder in his pocket. The officer arrested defendant and took him to a State Highway Patrol office where he was interrogated by State Bureau of Investigation Agent Michael Hall. Defendant admitted to Agent Hall that the bag of powder found in his pocket belonged to defendant, that he was a "mule", that he planned to sell it for someone else he refused to name, and that he expected to make \$1,500.00 on the transaction.

On appeal, defendant makes a single argument: the trial court erred in denying his motion to suppress his statements to Agent Hall. We affirm.

Standard of Review

"This Court's review of a trial court's denial of a motion to suppress in a criminal proceeding is strictly limited to a determination of whether the court's findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings

STATE v. BROWN

[204 N.C. App. 567 (2010)]

support the court's conclusions of law." *In re Pittman*, 149 N.C. App. 756, 762, 561 S.E.2d 560, 565 (citation omitted), *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003). This standard applies even where the motion to suppress is based on alleged violations of constitutional rights such as those afforded by *Miranda*. *Id.* "In considering a motion to suppress a statement for lack of voluntariness, the trial court must determine whether the State has met its burden of showing by a preponderance of the evidence that the statement was voluntarily and understandingly given." *State v. Nguyen*, 178 N.C. App. 447, 451, 632 S.E.2d 197, 201 (2006) (citing *State v. Mlo*, 335 N.C. 353, 363-64, 440 S.E.2d 98, 102, *cert. denied*, 512 U.S. 1224, 129 L. Ed. 2d 841 (1994)). However, where a defendant fails "to separately assign error to any of the numbered findings of fact in the trial court's order denying defendant's motion to suppress. . . . our Court's review of this assignment of error is 'limited to whether the trial court's findings of fact support its conclusions of law.'" *Id.* at 451-52, 632 S.E.2d at 201 (quoting *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999)).

Analysis

Defendant argues the trial court erred in denying his motion to suppress his statements to Agent Hall. We disagree.

In his pretrial motion to suppress, defendant contended that defendant's waiver of his *Miranda* rights was invalid because it was not made knowingly, intelligently and voluntarily. The trial court made ten findings of fact in support of its three conclusions of law:

1. That neither [] Defendant's State or Federal constitutional rights were violated by the interview of [] Defendant.
2. There were no promises, offers of reward or threats to persuade or induce [] Defendant to make a statement.
3. That the waiver of Defendant's right to have counsel before being interviewed by Law Enforcement was made freely, voluntarily, and understandingly as were the incriminating statements that followed.

Here, defendant failed to assign error to any of the trial court's findings, limiting our review to whether the court's findings support its conclusions. *Id.* at 451-52, 632 S.E.2d at 201.

Despite his failure to assign error to any findings, in his brief, defendant asserts "the trial court's factual finding that [defendant]

STATE v. BROWN

[204 N.C. App. 567 (2010)]

understood and validly waived each of his Miranda rights is not supported by competent evidence.” The trial court did not make such a finding. From the context of defendant’s argument, however, he appears to challenge finding 6, which states:

6. After completing the interview with [the woman with whom defendant was arrested], at or about 11:06 a.m., Agent Hall began a conversation with [] Defendant by first advising [] Defendant of his Miranda rights. Agent Hall read each of the Miranda rights one at a time, and after reading each right, asking [] Defendant if he understood, to which [] Defendant replied “yes”, Agent Hall put a checkmark beside each right [to which] Defendant responded in the affirmative as appears on Exhibit M1, that is attached hereto and incorporated herein by reference.

Having not assigned error to this finding, it is conclusive on appeal. This finding, and the court’s findings that defendant was coherent and did not appear to be under the influence of drugs or alcohol, and that no law enforcement officer offered any reward or inducement for his statements, fully support the trial court’s conclusions.

We note that even had defendant properly preserved a challenge to finding 6 for our review, he would not prevail. During Agent Hall’s hearing testimony, he recounted his reading of each statement on the *Miranda* form to defendant, waiting for defendant to respond in the affirmative and then checking off the statement on the form. The following colloquy ensued:

[Agent Hall]: You have the right to remain silent. After I read that, I asked him did he understand that. He said, yes. Placed a check beside that. Anything you say can be used—can be and may be used as evidence against you in court. He understood that, as well. You have the right to talk to—

[Defense counsel]: Objection to that conclusion, as to whether or not he understood it. And he’s saying what conversation they had—

The Court: Objection sustained.

[Defense counsel]: Thank you, Your Honor.

[Agent Hall]: The next one I read was: You have the right to talk with a lawyer before questioning and have a lawyer with you while you’re being questioned. I asked him if he understood that. He said, yes. I put a check beside that, as well.

STATE v. BROWN

[204 N.C. App. 567 (2010)]

The next [sic] I read to him is: If you want a lawyer before or during questioning but cannot afford to hire a lawyer, one would be appointed to you at no cost before questioning. I asked him if he understood that. He said, yes. I put a check beside that one, as well.

After that, I asked him—there's another statement underneath that, and it is: I have read this statement of my rights and I understand what my rights are. And I put—and I asked him if he understood that—all that, and he said, yes.

Q: Now, after you did that, what did you do next?

[Agent Hall]: I put an "X" to where to sign, and I showed him—I said that—if you understand all these rights that I have read to you. And he said, yes, again. I asked him to sign it and he said he would not sign it; he refused to sign it.

Q: Now as far as a waiver of rights, the bottom of that form, did you ask any questions concerning that, also?

[Agent Hall]: I did.

Q: And what questions did you ask?

[Agent Hall]: I started out by, do you understand each of these rights that I have explained to you? He said, yes. I checked the yes box. . . .

Defendant contends finding 6 is not supported because, after defense counsel's objection, Agent Hall never explicitly stated that defendant responded "yes" after being asked whether he understood that anything he said could be used against him. However, as defendant acknowledges, Agent Hall stated that he asked defendant "if you understand all these rights that I have read to you. And he said, yes, again." Agent Hall later repeated this question, asking defendant, "do you understand each of these rights that I have explained to you? He said, yes." Defendant argues this was insufficient because defendant's "assent to these broadly-worded questions cannot substitute for evidence specifically showing that he understood each individual *Miranda* warning." However, he cites no authority for the proposition that reading individual *Miranda* warnings to a defendant and then receiving responses of "yes" to repeated questions of whether defendant understood them is insufficient to protect defendant's constitutional rights. Our case law makes clear that the ultimate test of

MRD MOTORSPORTS, INC. v. TRAIL MOTORSPORT, LLC

[204 N.C. App. 572 (2010)]

admissibility is whether a waiver is made knowingly and voluntarily and that this determination is made based on the totality of the circumstances. *See State v. Rook*, 304 N.C. 201, 216, 283 S.E.2d 732, 742 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982).

Agent Hall's testimony supports finding 6 in that Agent Hall advised defendant of his *Miranda* rights, read each statement on the *Miranda* form and asked defendant if he understood them, put checkmarks on the list by each statement as he went through indicating that defendant had assented, and then twice confirmed that defendant understood all of the rights read to him. The totality of the circumstances present here, as reflected in the trial court's findings, fully support its conclusion that defendant's waiver of his *Miranda* rights was "made freely, voluntarily, and understandingly."

Affirmed.

Judges ELMORE and ERVIN concur.

MRD MOTORSPORTS, INC., PLAINTIFF v. TRAIL MOTORSPORTS, LLC A/K/A TRAIL
MOTORSPORT, INC., ARMANDO FITZ, AND ARTHUR F. SHELTON, DEFENDANTS

No. COA09-1566

(Filed 15 June 2010)

1. Judgments— default judgment—abuse of discretion—failure to award treble damages—unfair trade practices

The trial court abused its discretion by failing to award treble damages under N.C.G.S. § 75-16 against defendants Trail and Shelton when plaintiff elected this remedy in its motion for default judgment. Defendants Shelton and Trail's liability for unfair and deceptive trade practices was sufficiently alleged and deemed admitted. Although defendants Shelton and Trail may be held jointly and severally liable for the full amount of damages as trebled, defendant Fitz may be held jointly and severally liable with these defendants only for \$66,000 of the \$198,000 total damage award.

MRD MOTORSPORTS, INC. v. TRAIL MOTORSPORT, LLC

[204 N.C. App. 572 (2010)]

2. Attorney Fees— trial court’s failure to exercise discretion—remand

The trial court erred by failing to consider plaintiff’s request for attorney fees under N.C.G.S. § 75-16.1. On remand, the trial court must consider whether to exercise its discretion to award attorney fees.

Appeal by plaintiff from judgment entered 13 July 2009 by Judge Tanya Wallace in Cabarrus County Superior Court. Heard in the Court of Appeals 26 April 2010.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Adam L. Ross, and Sarah M. Brady, for plaintiff-appellant.

No brief for defendants-appellees.

MARTIN, Chief Judge.

MRD Motorsports, Inc. (“plaintiff”) is a Florida corporation with its principal place of business in Concord, North Carolina. Plaintiff owns and operates an automotive racing team that competes in National Association of Stock Car Auto Racing (“NASCAR”) sanctioned events in the Camping World Truck series and Nationwide series. Trail Motorsports, LLC (“defendant Trail”) is a Wyoming company with its principal place of business in Mooresville, North Carolina. Defendant Trail also owns and operates one or more race teams that compete in such NASCAR sanctioned events.

Plaintiff filed its complaint in this action alleging the following: In 2009, defendant Trail entered into a contract with a driver to race in 2009 Camping World Truck series events. However, it did not have the necessary equipment or staff to compete in the Camping World Truck events that were to occur in Daytona on 13 February 2009 (“Daytona race”) and California on 21 February 2009 (“California race”). In February 2009, Armando Fitz (“defendant Fitz”), an officer of defendant Trail, contacted Dave Malcolmson (“Malcolmson”), plaintiff’s president, to inquire as to whether plaintiff would lease its race team to defendant Trail for the Daytona and California races. The race driver at these events was to be the driver hired by defendant Trail.

Plaintiff and defendant Trail ultimately entered into a written contract in early February 2009. Pursuant to the terms of this contract, defendant Trail was to pay plaintiff \$66,000 by 6 February 2009 for the Daytona race and an additional \$66,000 by 16 February 2009

MRD MOTORSPORTS, INC. v. TRAIL MOTORSPORT, LLC

[204 N.C. App. 572 (2010)]

for the California race. In return, plaintiff was to provide defendant Trail with services and equipment “including, but not limited to a primary and backup race truck, a fully equipped race hauler, spare parts, a complete race crew, and an over the wall pit stop crew with required equipment” for both the Daytona and California races.

Defendant Trail paid plaintiff for the Daytona race on 10 February 2009, three days before the Daytona race and four days after the date set for payment. Despite the untimely payment, plaintiff provided the services to which it had agreed under the contract for the Daytona race. Defendant Trail did not timely make the scheduled payment for the California race, and on 17 February 2009, Malcolmson and Arthur F. Shelton (“defendant Shelton”), a manager of defendant Trail, discussed the payment issue. Defendant Shelton assured Malcolmson that he would have the funds in plaintiff’s account by the close of business on 18 February 2009. The funds were not transferred as promised. On 20 February 2009, defendant Shelton called Malcolmson and told him that defendant Trail had the money to pay plaintiff but a bank hold was preventing them from transferring the money to plaintiff on time. Defendant Shelton assured Malcolmson that the money would be paid no later than Thursday following the California race. In reliance on defendant Shelton’s statements, plaintiff provided the staff and equipment to defendant Trail for the California race. Defendant Trail failed to pay plaintiff the additional \$66,000, and, despite additional assurances to plaintiff that payment was forthcoming, defendant Trail has not paid plaintiff the \$66,000 owed for the California race.

On 23 March 2009, plaintiff filed its complaint against defendant Trail, defendant Fitz, and defendant Shelton (collectively “defendants”) seeking relief for breach of contract, fraud, unfair and deceptive trade practices, or, alternatively, unjust enrichment. In support of these claims, plaintiff alleged: (1) that defendants breached their contract with plaintiff by failing to pay the \$66,000 for the California race; (2) that defendant Shelton, in promising that payment for the California race was forthcoming when he knew that such payment would not be submitted, made material misrepresentations of fact individually and on behalf of defendant Trail; (3) that these misrepresentations were made with the intent to induce, and in fact did “induce[,] [plaintiff] to allow [defendant] Trail . . . to use its race team at the California race”; (4) that these actions, which were “in and affecting commerce,” directly and proximately caused plaintiff injury in the amount of at least \$66,000; and (5) that because defendant Trail

MRD MOTORSPORTS, INC. v. TRAIL MOTORSPORT, LLC

[204 N.C. App. 572 (2010)]

“is nothing but the alter ego of” defendants Fitz and Shelton, each defendant “should also be held jointly and severally liable for [p]laintiff’s harm.” Plaintiff asked the trial court to grant it an award of actual damages, attorneys’ fees, prejudgment interest, and costs, as well as punitive damages for the “willful, wanton, intentional, [and] malicious” conduct on the part of defendants Shelton and Trail. In the alternative, plaintiff asked for an award of “treble its actual damages pursuant to N.C.G.S. § 75-16.”

The record reflects that defendants Shelton and Trail received service of process by certified mail on 28 March 2009 and 30 March 2009, respectively. By reason of their failure to answer or otherwise appear, their default was entered on 7 May 2009. Defendant Fitz was personally served on 17 May 2009. On 25 June 2009, an entry of default was granted as to defendant Fitz.

Plaintiff moved for default judgments against all defendants. Against defendants Trail and Shelton, plaintiff elected to recover treble damages and attorneys’ fees pursuant to N.C.G.S. §§ 75-16 and 75-16.1 as well as prejudgment interest and costs. Plaintiff elected to recover from defendant Fitz actual damages of \$66,000 for breach of contract plus costs and prejudgment interest. In support of its motions, plaintiff provided an affidavit verifying the complaint and an affidavit stating the amount of attorneys’ fees incurred in the prosecution of the case.

On 13 July 2009, after a hearing at which none of the defendants appeared, the trial court entered Default Judgment against all defendants in which it ordered “that [p]laintiff shall have and recover judgment against all [d]efendants, jointly and severally in the principal sum of \$66,000, together with interest thereon at the legal rate from the date of [d]efendants’ breach of contract, February 16, 2009, plus costs of \$136.15.” The trial court did not address plaintiff’s request for treble damages against defendants Trail and Shelton or its prayer for attorneys’ fees. Plaintiff appeals.

As a general rule, this Court reviews an entry of default judgment for abuse of discretion. *See Battle v. Sabates*, — N.C. App. —, —, 681 S.E.2d 788, 796-97 (2009) (“However, [i]mposition of sanctions that are directed to the outcome of the case, such as . . . default judgments . . . are reviewed on appeal from final judgment, and while the standard of review is often stated to be abuse of discretion, the most drastic penalties, dismissal or default, are examined in the light of the general purpose of the Rules to encourage trial on the merits.” (inter-

MRD MOTORSPORTS, INC. v. TRAIL MOTORSPORT, LLC

[204 N.C. App. 572 (2010)]

nal quotation marks omitted) (alteration in original)). “Abuse of discretion exists when the challenged actions are manifestly unsupported by reason.” *Barnes v. Wells*, 165 N.C. App. 575, 580, 599 S.E.2d 585, 589 (2004) (internal quotation marks omitted).

[1] Plaintiff first argues that the trial court abused its discretion in failing to award treble damages pursuant to N.C.G.S. § 75-16 against defendants Trail and Shelton when plaintiff clearly elected this remedy in its Motion for Default Judgment. “When default is entered due to a defendant’s failure to answer, the substantive allegations contained in [the] plaintiff’s complaint are no longer in issue, and for the purposes of entry of default and default judgment, are deemed admitted.” *Luke v. Omega Consulting Grp., LC*, 194 N.C. App. 745, 751, 670 S.E.2d 604, 609 (2009). Thus, once default judgment is entered, the plaintiff is entitled to recover damages prayed for in the complaint, provided the facts alleged properly state a cause of action upon which the law gives relief. *Meir v. Walton*, 6 N.C. App. 415, 417-18, 170 S.E.2d 166, 168-69 (1969) (stating that “plaintiffs are entitled to such relief as the law gives them upon the facts alleged” within the limits of the relief “actually demanded somewhere in the complaint”). However, “[w]here the same course of conduct gives rise to . . . an action for breach of contract, and . . . gives rise to a cause of action for violation of G.S. 75-1.1, damages may be recovered either for the breach of contract, or for violation of G.S. 75-1.1, but not for both.” *Marshall v. Miller*, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103, *disc. review denied*, 301 N.C. 401, 274 S.E.2d 226 (1980), *reconsideration granted*, 301 N.C. 721, 274 S.E.2d 229, *aff’d as modified*, 302 N.C. 539, 276 S.E.2d 397 (1981). In such a case, the plaintiff must elect the remedy, as he is entitled to only “one redress for a single wrong.” *McCabe v. Dawkins*, 97 N.C. App. 447, 448, 388 S.E.2d 571, 572, *disc. review denied*, 326 N.C. 597, 393 S.E.2d 880 (1990); *see also Ellis v. No. Star Co.*, 326 N.C. 219, 227, 388 S.E.2d 127, 132 (“Plaintiffs may in proper cases elect to recover either punitive damages under a common law claim or treble damages under N.C.G.S. § 75-16, but they may not recover both.”), *reh’g denied*, 326 N.C. 488, 392 S.E.2d 89 (1990). The trial court must then honor the plaintiff’s choice and award damages accordingly. *See Ellis*, 326 N.C. at 227-28, 388 S.E.2d at 132 (noting that on remand “the trial court must allow [the plaintiff] to elect its remedy”).

A default judgment having been entered against each defendant for failure to file a responsive pleading, the allegations contained in the complaint were deemed admitted, including the several liability

MRD MOTORSPORTS, INC. v. TRAIL MOTORSPORT, LLC

[204 N.C. App. 572 (2010)]

of each defendant. *Blankeship v. Town & Country Ford, Inc.*, 174 N.C. App. 764, 767, 622 S.E.2d 638, 640 (2005). From our review of these allegations, it is evident that defendants Shelton and Trail's liability for unfair and deceptive trade practices was sufficiently alleged and deemed admitted. *See Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 ("In order to establish a violation of N.C.G.S. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs."), *reh'g denied*, 352 N.C. 599, 544 S.E.2d 771 (2000). As it was entitled to do, plaintiff elected to recover treble damages against defendant Trail and defendant Shelton pursuant to N.C.G.S. § 75-16. Thus, the trial court was required to award treble damages as against those defendants. *Marshall v. Miller*, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981) (noting that "[a]bsent statutory language [in N.C.G.S. § 75-16] making trebling discretionary with the trial judge, we must conclude that the Legislature intended trebling of any damages assessed to be automatic once a violation is shown"); *see also Ellis*, 326 N.C. at 227-28, 388 S.E.2d at 132. Since the trial court failed to do so, it abused its discretion.

There has been no challenge to the judgment entered against defendant Fitz for \$66,000, and we accordingly do not address the validity of this order. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). On remand the trial court should enter an order trebling the damages against defendants Shelton and Trail. Though defendants Shelton and Trail are to be held jointly and severally liable for the full amount of damages as trebled, defendant Fitz may be held jointly and severally liable with defendants Shelton and Trail only for \$66,000 of the \$198,000 total damage award.

[2] Finally, plaintiff argues the trial court erred in failing to consider its request to award attorneys' fees pursuant to N.C.G.S. § 75-16.1. The decision to award attorneys' fees to the plaintiff under N.C.G.S. § 75-16.1 is discretionary. N.C. Gen. Stat. § 75-16.1 (2009) (stating that "the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party"). Accordingly, "[u]pon remand, the trial court must also consider whether to exercise its discretion to award attorney's fees under N.C.[G.S.] § 75-16.1." *Jones v. Harrelson & Smith Contr's, LLC*, 194 N.C. App. 203, 217, 670 S.E.2d 242, 252 (2008), *aff'd per curiam*, 363 N.C. 371, 677 S.E.2d 453 (2009).

STATE v. MORTON

[204 N.C. App. 578 (2010)]

Reversed and Remanded.

Judges JACKSON and BEASLEY concur.

STATE OF NORTH CAROLINA v. KELCIE LEE ANDREW MORTON

No. COA08-1020-2

(Filed 15 June 2010)

**1. Search and Seizure— digital scale seized from pocket—
reasonable and justified**

The facts plus an informant's tip were sufficient to support the trial court's conclusion that an officer was reasonable and justified in seizing a digital scale from defendant.

**2. Search and Seizure— digital scale—further warrantless
search**

The facts supported the trial court's conclusions, the conclusions on probable cause were not inconsistent, and the trial court did not err by concluding that the discovery of a digital scale created grounds for a further search of defendant without a warrant.

**3. Search and Seizure— findings—reasonable suspicion to
search—scope of stop**

Challenged findings concerning reasonable suspicion to search defendant and whether informants were reliable were settled in an earlier appeal, and the question of whether the officer exceeded the scope of the stop was settled above.

Appeal by defendant from judgment entered 25 April 2008 by Judge W. Osmond Smith, III, in Person County Superior Court. Heard in the Court of Appeals 25 February 2009. Opinion filed 21 July 2009. This case was appealed to the Supreme Court of North Carolina pursuant to N.C. Gen. Stat. § 7A-30(2), and a *per curiam* decision was rendered reversing the decision and remanding to the Court of Appeals for consideration of the remaining issues.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert T. Hargett, for the State.

Mercedes O. Chut for defendant-appellant.

STATE v. MORTON

[204 N.C. App. 578 (2010)]

HUNTER, JR., Robert N., Judge.

BACKGROUND

On 21 July 2009, this Court held in *State v. Morton*, — N.C. App. —, 679 S.E.2d 437 (2009) [*Morton I*] that the trial court erred in denying defendant's motion to suppress on the ground that the officer lacked reasonable suspicion to frisk defendant. In *State v. Morton*, 363 N.C. 737, 686 S.E.2d 510 (2009), the North Carolina Supreme Court reversed the decision of this Court on the basis of section (I) of the dissenting opinion from this Court. In section (I) of the dissent, Judge Robert C. Hunter stated: (1) the officers had reasonable suspicion to frisk defendant for weapons based on the totality of the circumstances, and (2) the confidential informants relied upon by the officers were sufficiently reliable to support a finding of reasonable suspicion. This case appears before this Court on remand for the purpose of deciding the remaining issues not addressed in *Morton I*.

Because a full factual background is outlined in *Morton I*, a reiteration of these facts is unnecessary. Facts from this case will instead be recounted as needed. In light of the instructions from the Supreme Court, we note that the officers had reasonable suspicion to frisk defendant for the reasons set out in section (I) of the dissent in *Morton I*, and we now consider: (1) whether the officers impermissibly exceeded the scope of the pat-down by removing a digital scale from defendant's pocket; (2) whether the officers had probable cause based on the removal of the digital scale to continue searching defendant; and (3) whether findings of fact 8, 10 and 14 are supported by competent evidence.

ANALYSIS

A. *Removal of the Scale*

[1] Defendant argues that the officers exceeded the scope of their search for weapons by confiscating a digital scale from defendant's front pocket. We disagree.

If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified[.]

STATE v. MORTON

[204 N.C. App. 578 (2010)]

Minnesota v. Dickerson, 508 U.S. 366, 375-76, 124 L. Ed. 2d 334, 346 (1993). Contraband includes a weighing scale where the scale is being used “to facilitate, or intended or designed to facilitate, violations of the Controlled Substances Act[.]” N.C. Gen. Stat. § 90-113.21 (2009).

Here, Officer Hughes testified that he knew the object in defendant’s pocket was a digital scale based on his pat-down without manipulation of the object. Officer Hughes testified that individuals will often carry such scales in order to weigh controlled substances prior to distribution. When Officer Hughes asked defendant if a scale was in his pocket, defendant confirmed Officer Hughes’ suspicion. These facts in conjunction with the informant tips that defendant was engaging in the sale of illegal drugs are sufficient to support the trial court’s conclusion that “Officer Hughes was reasonable and justified in seizing” the digital scale from defendant. These assignments of error are overruled.

B. Probable Cause

[2] Defendant argues that the trial court’s conclusions of law on probable cause are inconsistent and that the trial court erred in concluding that the discovery of the digital scale created grounds for a further search of defendant without a warrant. We disagree.

In its order, the trial court concluded as a matter of law:

3. Upon retrieving such item and confirming same to be digital pocket scales, with all the information and the totality of the circumstances in mind, Detective Hughes and Detective Massey had probable cause to believe that a search of the defendant would lead to discovery of evidence of a crime involving controlled substances; that is, the totality of the circumstances gives rise to a conclusion as to the fair probability of discovery of such evidence involving controlled substances.

4. At the time and place aforesaid, exigent circumstances existed to justify the warrantless search of the defendant based upon the probable cause as set forth above. It would have been unreasonable and impracticable to detain/delay the defendant while seeking a search warrant.

5. Though, upon the arrest of the defendant for possession of drug paraphernalia, the officers determined that the subsequent search of the defendant was incident to an arrest, it does not appear to this Court that the officers had probable cause to arrest the defendant only upon the discovery of the scales.

STATE v. MORTON

[204 N.C. App. 578 (2010)]

6. However, the officers had reasonable and justified suspicion to speak with the defendant and justification for a “Terry” frisk for weapons. Upon the discovery of the scales and with all of the other circumstances and information, the officers had probable cause under exigent circumstances to search the defendant for the presence of evidence of crime involving controlled substances.

Contrary to defendant’s characterization of the trial court’s order, there is no inconsistency present in these conclusions. Here, the trial court stated explicitly that the discovery of the digital scale, along with the other attendant circumstances, supported the warrantless search of defendant—not the mere presence of the digital scale in defendant’s pocket. The trial court’s statement in Conclusion of Law 5 that the scale alone would not have been sufficient is a mere observation for the sake of clarity and does not serve to create an inconsistency.

As to defendant’s further argument that there were not sufficient facts supporting a conclusion of probable cause, we have already discussed why Officer Hughes was justified in concluding that the digital scale was contraband under N.C.G.S. § 90-113.21 as a result of the informant tips that defendant was selling drugs. In addition to the informant tips, however, Officer Hughes also considered: (1) that defendant was coming from the area in which the informants claimed he was selling drugs, and (2) that defendant was acting in a nervous manner. These additional facts in conjunction with the digital scale and informant tips clearly support the conclusion that the officers had probable cause to search defendant.

Defendant makes no argument in his brief challenging the trial court’s conclusion that exigent circumstances were present, and therefore we conclude that the officers here conducted a lawful warrantless search of defendant. *See State v. Yates*, 162 N.C. App. 118, 589 S.E.2d 902 (2004) (warrantless search upheld where officer had probable cause to believe that defendant possessed drugs and that exigent circumstances were present). These assignments of error are overruled.

C. Findings of Fact

[3] Defendant claims that the trial court erred in making findings of fact 8, 10 and 14. We disagree.

The findings challenged by defendant are as follows:

STATE v. MORTON

[204 N.C. App. 578 (2010)]

8. Prior to that time, Detective Hughes and Detective Massey had received information from confidential and reliable informants and concerned citizens in the area that the officers deemed reliable and tending to indicate that the defendant had been involved in a recent drive-by shooting on Burch Avenue in Roxboro and further tending to indicate that the defendant had been dealing in illegal drugs in the area.

....

10. For his safety and that of his fellow officer, Detective Hughes conducted a pat down of the defendant as a frisk for weapons. Detective Hughes, in executing the frisk, detected nothing about the waistband of the defendant, felt something in the front pockets of the defendant, and in the back pants pocket of the defendant, Detective Hughes felt a hard rectangular-shaped object about 4-5 inches long and 3-4 inches wide. With the prior information received as to the defendant's past involvement in selling of narcotics and in frequenting that area, Detective Hughes immediately concluded in his mind, that the object was consistent in shape and density with that of digital pocket scales.

....

14. The information within the knowledge of the officers as to the defendant's involvement in the shooting and in the involvement of dealing in controlled substances had come from multiple sources and was fairly fresh, some having come within a day or two before July 2, 2006 and some as recent as two-four months prior. The last information provided to Detective Hughes as to the defendant's involvement in the illegal sales of drugs was not as old as two months.

As to findings 8 and 14, *Morton I* settled the questions of whether reasonable suspicion existed to pat down defendant and whether the informants were reliable. On the issue of whether Officer Hughes was justified in confiscating the digital scale in finding 10, we have already discussed and concluded *supra* that Officer Hughes did not exceed the scope of the *Terry* stop under the circumstances. This assignment of error is overruled.

CONCLUSION

On remand from the Supreme Court, we find no error in the jury's verdict finding defendant guilty of possession of drug paraphernalia and possession with intent to sell and deliver cocaine.

STATE v. MAUCK

[204 N.C. App. 583 (2010)]

No error.

Judges HUNTER, Robert C., and CALABRIA concur.

STATE OF NORTH CAROLINA v. JASON BRENT MAUCK, DEFENDANT

No. COA09-1042

(Filed 15 June 2010)

1. Probation and Parole— revocation—subject matter jurisdiction—transfer between counties

The trial court in Buncombe County had jurisdiction under N.C.G.S. § 15A-1344(a) to revoke defendant's probation where the original probation was entered in Haywood County but was later modified in Buncombe County. Defendant did not appeal from the modification of the order in Buncombe County, so that the notice of appeal required for jurisdiction was not proper, and the record did not include information which would be necessary for the Court of Appeals to determine if there was any impropriety in the transfer of the defendant's case from Haywood County to Buncombe County.

2. Probation and Parole— revocation—subject matter jurisdiction—same county as initial order

Buncombe County had subject matter jurisdiction for revoking defendant's probation where the initial probation was entered in Buncombe County.

Appeal by defendant from judgments entered on or about 2 April 200 by Judge C. Philip Ginn in Superior Court, Buncombe County. Heard in the Court of Appeals 27 January 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Catherine F. Jordan, for the State.

Lynn Norton-Ramirez, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgments revoking his probation. Defendant argues the trial court did not comply with N.C. Gen. Stat.

STATE v. MAUCK

[204 N.C. App. 583 (2010)]

§ 15A-1344(a). As we conclude the trial court complied with N.C. Gen. Stat. § 15A-1344(a), we affirm.

I. Background

On or about 20 October 2003, in Haywood County, defendant pled guilty to, *inter alia*, selling or delivering a schedule two controlled substance and possession with intent to sell or deliver cocaine (“drug convictions”). The file number on defendant’s judgment was 03CRS3703. Defendant received a suspended sentence requiring supervised probation for 36 months for both drug convictions. On 5 April 2007, the terms of defendant’s probation regarding his drug convictions in file number 03CRS3703 were modified in Buncombe County.¹ The Buncombe County court, in file number 07CRS2081, entered an order which required defendant to “obtain assessment at TASC[,]” “[s]erve an active term of 3 days . . . in the custody of” the Buncombe County Sheriff, and “report in a sober condition to begin serving his/her term on” 20 April 2007.

On or about 21 May 2007, defendant pled guilty in Buncombe County to possessing stolen goods or property (“theft conviction”). Defendant received a suspended sentence and was placed on supervised probation for 12 months.

On or about 2 April 2009, in Buncombe County, defendant’s probation was revoked on file number 07CRS2081, and he was ordered to an active sentence of 15 to 18 months for his drug convictions. Also on or about 2 April 2009, in Buncombe County, defendant’s probation was revoked for his theft conviction, and he was sentenced to an active term of 6 to 8 months imprisonment. Defendant appeals the two orders revoking his probation.

II. Probation Revocation

Defendant contends that

the trial court lacked subject matter jurisdiction to revoke Mr. Mauck’s probation in case 07 CRS 2081 because there was insufficient evidence that the case had been transferred to Buncombe County, that Mr. Mauck violated his probation in Buncombe County or that Mr. Mauck resided in Buncombe County.

(Original in all caps.)

1. There is no documentation in the record addressing the transfer of defendant’s case from Haywood County to Buncombe County; however, defendant has not appealed from the first Buncombe County order modifying his probation in 2007 and has not made any assignments of error or argument regarding entry of the first Buncombe County order modifying his probation.

STATE v. MAUCK

[204 N.C. App. 583 (2010)]

“Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal.” *McKoy v. McKoy*, — N.C. App. —, —, 689 S.E.2d 590, 592 (2010) (citation omitted). N.C. Gen. Stat. § 15A-1344(a) provides in pertinent part:

probation may be reduced, terminated, continued, extended, modified, or revoked by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where the sentence of probation was imposed, where the probationer violates probation, or where the probationer resides.

N.C. Gen. Stat. § 15A-1344(a) (2008). Defendant argues that Haywood County was the trial court where the sentence of probation was imposed, so for the Buncombe County trial court to have jurisdiction, the State must have proven that defendant’s case was transferred to Buncombe County, defendant violated his probation in Buncombe County or that defendant resided in Buncombe County at the time of the violation. Defendant further contends that because there was insufficient evidence of the transfer of probation to Buncombe County, where the violation occurred, and where defendant resided, the trial court in Buncombe County did not have jurisdiction to revoke his probation under N.C. Gen. Stat. § 15A-1344(a).

A. Drug Convictions

[1] Though defendant was originally sentenced and probation was imposed for his drug convictions in Haywood County, Buncombe County modified the terms of the original Haywood County probation order by entering its own order with a new file number approximately two years before the revocation took place. Defendant’s modified probation order was entered on 5 April 2007, in Buncombe County in file number 07CRS2081, and defendant was then supervised by Buncombe County’s probation office pursuant to that order. Defendant’s probation was revoked on or about 2 April 2009 in Buncombe County in file number 07CRS2081. Thus, defendant’s probation revocation was entered “where the sentence of probation was imposed[.]” *Id.* Though defendant was originally convicted and probation was first imposed in Haywood County, the probation order which he violated was imposed in Buncombe County in 2007 through the modification of his original order. *See id.*

STATE v. MAUCK

[204 N.C. App. 583 (2010)]

Thus, defendant's challenge to the trial court's subject matter jurisdiction is really based upon the 2007 Buncombe County order. However, defendant did not appeal from the 2007 order modifying his probation. While "[s]ubject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal[.]" *In re S.T.P.*, — N.C. App. —, —, 689 S.E.2d 223, 226 (2010) (citation and quotation marks omitted), when filing a notice of appeal, as defendant did here, the notice "shall designate the judgment or order from which an appeal is taken[.]" N.C.R. App. P. 4(b). Without a proper notice of appeal, this Court does not have the jurisdiction to hear a case. *See, e.g., State v. Morris*, 41 N.C. App. 164, 166, 254 S.E.2d 241, 242 ("Notice of Appeal is required in order to give this Court jurisdiction to hear and decide a case." (citations omitted)). Therefore, this Court cannot consider the question of subject matter jurisdiction as to defendant's 2007 order modifying probation because defendant did not appeal from it. In addition, the record on appeal does not include information which would be necessary for us to determine if there was any impropriety in the transfer of the defendant's case from Haywood County to Buncombe County prior to entry of the modification order in 2007.

In conclusion, the trial court in Buncombe County had jurisdiction under N.C. Gen. Stat. § 15A-1344(a) to revoke probation where defendant's modified probation order was entered in Buncombe County in 2007. *See* N.C. Gen. Stat. § 15A-1344(a). Whether Buncombe County properly had subject matter jurisdiction to enter the 2007 order modifying defendant's probation is a question outside the scope of review of this Court, as defendant has not appealed from that order. *See, e.g., Morris* at 166, 254 S.E.2d at 242. This argument is overruled.

B. Theft Conviction

[2] On or about 21 May 2007, defendant's theft conviction, for which he also received probation, was entered in Buncombe County. Also, on or about 2 April 2009 in Buncombe County, defendant's probation was revoked as to his theft conviction. We can discern no cognizable argument regarding subject matter jurisdiction as to the revocation of defendant's probation for his theft conviction as it was originally entered in Buncombe County and was revoked in the same court. The trial court has again complied with N.C. Gen. Stat. § 15A-1344(a). *See* N.C. Gen. Stat. § 15A-1344(a). This argument is without merit.

STATE v. BETHEA

[204 N.C. App. 587 (2010)]

III. Conclusion

We conclude that the trial court properly revoked defendant's probation pursuant to N.C. Gen. Stat. § 15A-1344(a), and thus we affirm.

AFFIRMED.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. RICKY BETHEA

No. COA09-833

(Filed 15 June 2010)

Sentencing— out-of-state conviction—felony or substantially similar

The trial court did not err in sentencing defendant as a prior record level II offender based on his out-of-state conviction in federal court for conspiracy to distribute cocaine. Defendant's stipulation to the existence of his prior felony conviction, along with his failure to object to the sentencing worksheet, was sufficient evidence to show that the point value of defendant's out-of-state conviction was a felony or "substantially similar" to a Class A1 or Class 1 misdemeanor.

Appeal by defendant from judgments entered 6 January 2009 by Judge Christopher M. Collier in Richmond County Superior Court. Heard in the Court of Appeals 19 November 2009.

Attorney General Roy Cooper, by Assistant Attorney General Christine A. Goebel, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Defendant appeals from the trial court's judgment sentencing him as a prior record level II offender based on an out-of-state conviction in federal court for conspiracy to distribute cocaine. On appeal, de-

STATE v. BETHEA

[204 N.C. App. 587 (2010)]

defendant solely contends that the trial court's calculation of his prior record level was not supported by sufficient evidence to show that the point value of his out-of-state conviction for a federal felony was a felony or "substantially similar" to a Class A1 or Class 1 misdemeanor. We affirm defendant's sentence because defendant's counsel's assertions at trial, along with his failure to object to the sentencing worksheet, constituted a stipulation to the existence of his prior felony conviction and their point value. See *State v. Bohler*, — N.C. App. —, —, 681 S.E.2d 801, 805-07 (2009), *disc. review denied*, — N.C. —, —, S.E.2d — (2010); *State v. Hinton*, — N.C. App. —, —, 675 S.E.2d 672, 672 (2009); *State v. Morgan*, 164 N.C. App. 298, 307, 595 S.E.2d 804, 811 (2004); *State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000).

I. Procedural & Factual Background

Defendant was indicted for the following charges in three separate indictments: (1) 5 September 2006—one count of possession of marijuana with intent to sell and deliver, one count of trafficking cocaine, one count of maintaining a vehicle for keeping controlled substances, and three counts of possession of a firearm by a felon; (2) 4 February 2008—one count of possession of marijuana with intent to sell and deliver, one count of maintaining a vehicle for keeping controlled substances, and one count of possession of cocaine with intent to sell and deliver; and (3) 10 March 2008—one count of possession of marijuana with intent to sell and deliver, one count of possession of cocaine with intent to sell and deliver, and one count of maintaining a vehicle for keeping controlled substances.

Defendant's cases in all of the above indictments were consolidated and came on for hearing at the 5 January 2009 Criminal Session of the Richmond County Superior Court. During the hearing, the prosecutor reduced the charge of trafficking in cocaine in the 5 September 2006 indictment to two counts of possession of cocaine with intent to sell and deliver. Defendant pled guilty pursuant to an *Alford* plea to four counts of possession of cocaine with intent to sell and deliver and one count of possession of a firearm by a felon. The trial court properly reviewed the plea with defendant and accepted his plea. The prosecutor dismissed the remainder of the charges against defendant.

At the sentencing phase, the prosecutor presented defendant's prior record level worksheet to the court which indicated that defendant had a prior record level II for sentencing purposes.

STATE v. BETHEA

[204 N.C. App. 587 (2010)]

Defendant's counsel signed the prior record level worksheet, which noted that defendant had been convicted in federal court in Philadelphia of conspiracy to distribute cocaine on 21 December 1993, and listed the conviction as a Class I felony. Moreover, when asked by the prosecutor whether defendant stipulated to having two prior record level points for felony sentencing purposes, defense counsel made the following statement: "Judge, I saw one conviction on the worksheet. [Defendant] has agreed that's him. Two points." Further, defendant chose not to speak on his own behalf when asked by his counsel if there was anything he would like to say.

The court sentenced defendant as a prior record level II offender based on the prior record level worksheet and defense counsel's assertions. Defendant was sentenced in the following manner: (1) 6 to 8 months' imprisonment for the two new counts of possession of cocaine with intent to sell and deliver which were consolidated by the court; (2) 12 to 15 months' imprisonment for possession of a firearm by a felon; and (3) 6 to 8 months' imprisonment for the remaining two counts of possession of cocaine with intent to sell and deliver which were also consolidated by the court. The trial court ordered each prison sentence to run at the expiration of the preceding sentence. Defendant appeals.

II. Analysis

On appeal, defendant argues that the trial court erred in assigning two points for his previous Philadelphia federal conviction because the State failed to carry its burden of demonstrating that the out-of-state conviction was a felony or substantially similar to a Class A1 or Class 1 misdemeanor. Thus, he contends that he should have been sentenced under prior record level I rather than II. We disagree and review defendant's assignment of error *de novo*. See *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007).

Defendant's prior record level as a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions. N.C. Gen. Stat. § 15A-1340.14(a) (2009). Two points are assigned for each prior felony Class H or I conviction. N.C. Gen. Stat. § 15A-1340.14(b)(4). A defendant with at least 1, but not more than 4 points is classified as a level II offender. N.C. Gen. Stat. § 15A-1340.14(c). In the present case, defendant was classified as a level II offender based on the two points he received for his prior conviction in Philadelphia.

STATE v. BETHEA

[204 N.C. App. 587 (2010)]

A defendant's prior convictions may be proved by any of the following methods:

- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." *Id.* The State may not rely solely on the prior record level worksheet to meet its burden; however, "a sentencing worksheet coupled with statements by counsel may constitute a stipulation by the parties to the prior convictions listed therein." *Hinton*, — N.C. App. at —, 675 S.E.2d at 674 (citing *State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000)).

Here, defendant's prior record level worksheet indicating that defendant was assigned two points for his prior out-of-state conviction was presented to the court by the prosecutor after being signed by defense counsel. In addition, during the 5 January 2009 criminal hearing, defendant pled guilty pursuant to an *Alford* plea and the following brief exchange ensued between prosecutor, Gordon Wikle, and defense counsel, Thomas Nichols, regarding defendant's prior conviction:

MR. WIKLE: Does [defendant] stipulate to having two prior record level points for felony sentencing purposes, making him—

MR. NICHOLS: Judge, I saw one conviction on the worksheet. Ricky has agreed that's him. Two points.

Defense counsel specifically stipulated to defendant's prior conviction and did not make any objection to the worksheet. Moreover, when asked by defense counsel if there was anything he wanted to say, defendant said, "No, sir," and did not assert an objection to the two-point addition based on his prior out-of-state conviction. By statute, a two-point value is the minimum default value which can be assigned for a felony. *See* N.C. Gen. Stat. § 15A-1340.14(b)(4).

STATE v. DARK

[204 N.C. App. 591 (2010)]

Based on the aforementioned, we conclude that defendant's prior level worksheet, along with defense counsel's remark and defendant's failure to dispute the existence of his out-of-state conviction are clearly sufficient to meet the State's burden under N.C. Gen. Stat. § 15A-1340.14(f) of proving that a prior conviction exists, that defendant is the same person as the offender named in the prior conviction, and that the prior offense carried a point value of two. *See Bohler*, — N.C. App. at —, 681 S.E.2d at 805-07. Accordingly, we affirm defendant's sentence and hold that the trial court did not err.

No error.

Judges STROUD and ERVIN concur.

STATE OF NORTH CAROLINA v. KENDRICK DARK

No. COA09-1287

(Filed 15 June 2010)

Discovery— denial of motion to compel disclosure—confidential informant

The trial court did not err in a possession of cocaine with intent to sell or deliver and sale and delivery of cocaine case by denying defendant's motion to compel disclosure of the identity of a confidential informant. Defendant failed to carry his burden of showing that the facts of this case mandated disclosure when there was no forecast as to how the identity of the confidential informant could provide useful information for defendant in order to clarify any contradiction between the State's evidence and defendant's denial.

Appeal by defendant from judgments entered 28 April 2009 by Judge Henry W. Hight, Jr. in Granville County Superior Court. Heard in the Court of Appeals 24 May 2010.

STATE v. DARK

[204 N.C. App. 591 (2010)]

Attorney General Roy Cooper, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

Kevin P. Bradley, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was indicted for possession of cocaine with intent to sell or deliver and sale and delivery of cocaine. He entered pleas of not guilty.

Prior to trial, defendant moved to require the State to disclose the identity of a confidential informant. After an evidentiary hearing conducted before the jury was empaneled, the trial court denied the motion. At trial, the State's evidence tended to show that on 21 February 2007, a police officer with the Henderson Police Department set up a possible drug deal with the assistance of a confidential informant. The informant made a telephone call to set up a drug transaction between the officer and defendant. Defendant told the informant to come to a specific parking spot at Piedmont Village Apartments.

The police officer drove to Piedmont Village Apartments with the informant. Soon after they arrived at the apartments, defendant walked over to the driver's side window where the police officer was seated. Defendant handed the officer twenty dollars worth of a substance later identified as crack cocaine and a bag of marijuana. Defendant put the drugs into the officer's left hand and took \$40.00 from the officer's right hand. The officer thanked defendant, and defendant walked back towards the apartments. The officer left immediately to meet with a narcotics agent with the Granville County Sheriff's Department. He turned the drugs over to the agent and told him what had transpired during the drug buy.

The officer identified defendant as the person who sold him the drugs from a photographic line-up. The officer also wore a wire during the transaction with defendant, and the agent, who was parked close enough to see the officer, could hear the conversation between the officer and defendant. The agent testified that he recognized defendant's voice from another undercover operation which occurred the week prior to the event at issue in this case.

Defendant did not offer evidence. The jury found him guilty of both charges, and the trial court entered judgments upon the verdicts sentencing defendant to active terms of imprisonment of a minimum of sixteen months and a maximum of twenty months for sale and

STATE v. DARK

[204 N.C. App. 591 (2010)]

delivery of cocaine and a minimum of ten months and a maximum of twelve months for possession of cocaine, the sentences to run concurrently. Defendant gave notice of appeal.

Defendant's sole argument on appeal is that the trial court erred in denying his motion to compel the State to disclose the confidential informant's identity. After careful consideration of his argument, we find no error.

"[T]he state is privileged to withhold from a defendant the identity of a confidential informant, with certain exceptions." *State v. Newkirk*, 73 N.C. App. 83, 85, 325 S.E.2d 518, 520, *disc. review denied*, 313 N.C. 608, 332 S.E.2d 81 (1985). *Roviaro v. United States*, 353 U.S. 53, 1 L. Ed. 2d 639 (1957), sets forth the applicable test when disclosure is requested. *See State v. Jackson*, 103 N.C. App. 239, 241, 405 S.E.2d 354, 356 (1991), *aff'd per curiam*, 331 N.C. 113, 413 S.E.2d 798 (1992). "The trial court must balance the government's need to protect an informant's identity (to promote disclosure of crimes) with the defendant's right to present his case." *Id.* (citing *Roviaro*, 353 U.S. at 62, 1 L. Ed. 2d at 646). "However, before the courts should even begin the balancing of competing interests which *Roviaro* envisions, a defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances of his case mandate such disclosure." *State v. Watson*, 303 N.C. 533, 537, 279 S.E.2d 580, 582 (1981).

"Two factors weighing in favor of disclosure are (1) the informer was an actual participant in the crime compared to a mere informant, and (2) the state's evidence and defendant's evidence contradict on material facts that the informant could clarify." *Newkirk*, 73 N.C. App. at 86, 325 S.E.2d at 520 (citations omitted). Factors which weigh against disclosure include "whether the defendant admits culpability, offers no defense on the merits, or the evidence independent of the informer's testimony establishes the accused's guilt." *Id.* at 86, 325 S.E.2d at 520-21.

In this case, only the informant's presence and role in arranging the purchase weigh in favor of disclosure. We agree with the trial court's finding that "there has been no forecast as to how the identity of the confidential informant could provide useful information for the defendant in order to clarify any contradiction between the State's evidence and the defendant's denial." Moreover, testimony by the informant was not admitted at trial; instead, the testimony of the police officer and the narcotics agent established defendant's guilt.

STATE v. DARK

[204 N.C. App. 591 (2010)]

Defendant has not carried his burden of showing that the facts of this case mandate disclosure of the informant's identity. Accordingly, the trial court did not err in denying defendant's motion for disclosure.

No error.

Judges BRYANT and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 JUNE 2010)

AYERZA v. CABARRUS CNTY. DSS No. 09-1050	Cabarrus (08CVS4137)	Affirmed
BROOKS MILLWORK CO. v. LEVINE No. 09-781	Mecklenburg (08CVS6654)	Affirmed
CAROLINA HOMES BY DESIGN v. LYONS No. 09-74	Macon (06CVS493)	Affirmed
HAWKINS v. BRITESMILZ FAMILY No. 09-1358	Halifax (05CVS1317)	Affirmed
IN RE C.R.C. No. 09-1726	Bertie (07J21)	Affirmed in part, remanded in part
IN RE D.I. No. 10-241	Johnston (09J13-18)	Affirmed
IN RE J.A.C. No. 09-1715	Lincoln (07JT142)	Affirmed
IN RE L.D.B. No. 10-177	Sampson (06JA38)	Vacated and remanded
IN RE M.E.M. No. 10-20	Guilford (09JT73-74)	Affirmed
IN RE M.G. No. 07-643-2	Cumberland (06JA0401) (06JA0402) (06JA0400) (06JA0403)	Affirmed in part; reversed in part; remanded in part
IN RE P.R.B. No. 09-1646	Wilkes (06JT130)	Affirmed
IN RE S.H. No. 09-1616	Mecklenburg (07JT367)	Affirmed
IN RE T.M.S. No. 10-78	Guilford (08JA92)	Affirmed
IN RE W.Q.K. No. 09-1654	Buncombe (08JT181)	Affirmed
LEWIS v. PURCELL No. 09-670	Rockingham (07CVS2293)	Affirmed
MARTIN v. MARTIN No. 09-1215	Wilson (07CVD2665)	Affirmed in part, Reversed in part

PPD DEV., LP v. COGNITION PHARM. No. 09-396	New Hanover (08CVS3753)	Affirmed
RAGSDALE v. LAMAR OUTDOOR ADVER. No. 09-430	Indus. Comm. (IC532240) (IC222918)	Remanded
STAHR v. N.C. DEPT OF TRANSP. No. 09-1084	Henderson (06CVS731)	Reversed and Remanded
STATE v. AGUILAR No. 09-1288	Sampson (08CRS53068)	Dismissed
STATE v. ARTHUR No. 09-1139	Beaufort (07CRS52053) (07CRS51909)	No Error
STATE v. BARTS No. 09-1296	Alamance (83CRS16485-88)	Affirmed
STATE v. BLOUNT No. 09-1391	Wayne (08CRS55768)	No Error
STATE v. BOULER No. 09-1501	Wayne (08CRS50484)	Affirmed
STATE v. BUNTING No. 09-1679	Beaufort (07CRS51184)	No Error
STATE v. COLLINS No. 09-1294	Orange (08CRS860)	Reversed
STATE v. FRANKLIN No. 09-1513	Nash (06CRS52053-57) (06CRS52221-25) (06CRS52047) (06CRS53071)	Reversed and Remanded
STATE v. GORDON No. 09-1164	Transylvania (08CRS50473) (08CRS50467)	No Error
STATE v. GRANGER No. 09-1166	Gaston (07CRS60064-67) (07CRS60042)	No Error
STATE v. GROOMS No. 09-1388	Guilford (09CRS27610)	No prejudicial error
STATE v. HAMM No. 09-1206 (08CRS69166)	Wake (08CRS68821)	Remanded for resentencing
STATE v. HELMS No. 09-1165	Mecklenburg (08CRS16473) (07CRS66769)	No Error

STATE v. LYTLE No. 09-1427	Wake (08CRS6459-61) (08CRS30197) (08CRS5798)	No Error
STATE v. McDOUGALD No. 09-1688	Robeson (05CRS55905)	Affirmed
STATE v. O'SHIELDS No. 09-1342	Forsyth (07CRS59191) (07CRS59194)	No error; Remand for correction of clerical errors
STATE v. ROBINSON No. 09-1343	Sampson (07CRS51103)	No error in part; reversed and remanded in part
STATE v. SCHWARTZ No. 09-1227	New Hanover (07CRS3733)	No prejudicial error
STATE v. SCOTT No. 09-1200	Mecklenburg (07CRS216446-47)	No Error
STATE v. VELASQUEZ No. 09-1274	Mecklenburg (08CRS201325)	Dismissed
STATE v. WELLS No. 10-164	Henderson (08CRS54300-03) (08CRS53167-68)	Affirmed
STATE v. WEST No. 09-1328	Henderson (06CRS4237)	No Error
STATE v. WHITTED No. 09-1599	Durham (08CRS49465)	Dismissed
STATE v. WILLIAMS No. 09-1508	Stanly (09CRS739) (07CRS53226-27)	No Error
UNIFUND CCR PARTNERS v. ROWELL No. 09-949	Buncombe (08CVD4773)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW
APPEAL AND ERROR
ASSAULT
ATTORNEY FEES

BURGLARY AND UNLAWFUL
BREAKING OR ENTERING

CHILD ABUSE, DEPENDENCY, AND
NEGLECT
CHILD CUSTODY AND SUPPORT
CHILD VISITATION
CITIES AND TOWNS
CIVIL PROCEDURE
CONSTITUTIONAL LAW
CONTEMPT
CONTRACTS
CORPORATIONS
COSTS
CRIMINAL LAW

DAMAGES AND REMEDIES
DISCOVERY
DRUGS

EMPLOYER AND EMPLOYEE
ENVIRONMENTAL LAW
ESTOPPEL
EVIDENCE

FRAUD

IMMUNITY
INDICTMENT AND INFORMATION
INJUNCTIONS
INSURANCE

JUDGMENTS
JURISDICTION
JURY

MEDICAL MALPRACTICE

NEGLIGENCE

PARTIES
PENSIONS AND RETIREMENT
PLEADINGS
PROBATION AND PAROLE
PRODUCTS LIABILITY

REAL PROPERTY

SEARCH AND SEIZURE
SENTENCING
SEXUAL OFFENDERS
SEXUAL OFFENSES
STATUTES OF LIMITATION AND
REPOSE
SURETIES

TERMINATION OF PARENTAL RIGHTS
TORT CLAIMS ACT
TRESPASS
TRIALS

UTILITIES

VENUE

WATERS AND ADJOINING LANDS
WILLS
WORKERS' COMPENSATION

ADMINISTRATIVE LAW

Judicial review of agency decision—failure to adopt findings of fact—The Board of Trustees of the Teachers' and State Employees' Retirement System did not commit prejudicial error by failing to adopt certain of the administrative law judge's findings of fact including numbers 29, 30, 31, 33, 34, 36, 37, 38, 39, 40, and 41 in a case determining that petitioner was not eligible for long-term disability benefits because he had not accumulated five years of membership service in the retirement system. **McCaskill v. Dep't of State Treasurer, 373.**

APPEAL AND ERROR

Criminal trial—civil judgment recommended—no judgment in record—no appellate jurisdiction—The Court of Appeals did not have jurisdiction to review a criminal defendant's challenge to the trial court's "recommendation" that a civil judgment be entered for attorney fees for his prior court-appointed counsel where the record on appeal did not contain a civil judgment to that effect. **State v. Walker, 431.**

Interlocutory order and appeal—denial of motion to intervene or be joined as party—Rule 54(b) certification—substantial right—Although N.C.G.S. § 1A-1, Rule 54(b) certification did not provide the Court of Appeals with jurisdiction over this appeal since the case did not involve a final judgment as to any claim or party, the trial court's denial of an individual's motion to intervene or be joined as a party affected a substantial right that would be lost absent immediate appellate review because petitioner no longer owned the pertinent property and had no reason to pursue the case on remand. Further, petitioner's continued pursuit of this case could be dismissed as moot. **High Rock Lake Partners, LLC v. N.C. Dep't of Transp., 55.**

Interlocutory order and appeal—discovery—physician-patient privilege—substantial right—Although ordinarily discovery orders are not subject to immediate appeal, plaintiff's claim affected a substantial right and was immediately appealable because plaintiff was ordered to disclose matters she asserted were protected by the physician-patient privilege. **Midkiff v. Compton, 21.**

Interlocutory order and appeal—no substantial right—In an action involving the disposition of real property in accordance with decedent's will, respondents' appeal from the denial of their motion to show cause why the clerk of superior court should not be held in contempt was dismissed as from an interlocutory. The appeal was not brought pursuant to a Rule 54(b) certification and respondents failed to demonstrate that a substantial right would be lost absent immediate appellate review. Respondents incorrectly identified a party as an appellant in this matter and a charge of contempt was not available as a means of enforcement on the facts of this case. **Bare v. Atwood, 310.**

Interlocutory order and appeal—Rule 54(b) certification—Although the trial court's order did not resolve all of the issues raised by an estate's request for declaratory relief, the Court of Appeals had jurisdiction based on the trial court's certification of this case for immediate appellate review under N.C.G.S. § 1A-1, Rule 54(b). **Nelson v. Bennett, 467.**

Interlocutory order and appeal—Rule 54(b) certification—Plaintiff's appeal from the grant of a partial summary judgment order in favor of defendant

APPEAL AND ERROR—Continued

was certified for immediate appeal under N.C.G.S. § 1A-1, Rule 54(b). **N.C. Farm Bureau Mut. Ins. Co., Inc. v. Sadler, 145.**

Interlocutory order and appeal—statutory privilege asserted—medical review committee records—An appeal was properly before the Court of Appeals even though it was from an interlocutory order where it involved an assertion of statutory privilege in medical review committee records. **Bryson v. Haywood Reg'l Med. Ctr., 532.**

Late notice of appeal—treated as petition for certiorari—An appeal in a termination of parental rights case was treated as a petition for a writ of *certiorari* due to the importance of the issue even though the notice of appeal was one day late. **In re S.N.W., 556.**

Notice of appeal—failure to serve on all parties—jurisdictional—significant violation—An appeal was dismissed where plaintiff-appellants failed to comply with N.C. R. App. P. Rule 3(a) by not serving a notice of appeal on the non-appealing plaintiffs and previously dismissed defendants. Compliance with Rule 3 is jurisdictional and may be raised by the court. Furthermore, noncompliance is a significant and fundamental violation that frustrates the adversarial process and that no sanction less than dismissal will remedy. **Lee v. Winget Rd., LLC, 96.**

Preservation of issues—constitutional issue not raised at trial—Defendant did not preserve for appellate review his argument that the trial court erred by failing to dismiss a charge of incest because the relevant statute was overbroad. Defendant did not raise this constitutional issue at trial. **State v. Reid, 122.**

Preservation of issues—failure to make a motion to recuse trial judge—Respondent father failed to preserve for appellate review his argument that the trial judge in a termination of parental rights case erred by failing to recuse himself from the termination of parental rights hearing after having recused himself from a permanency planning hearing in the same case. The trial judge was not required to recuse himself *sua sponte* and respondent failed to move for the trial judge's recusal when the trial judge presided over the adjudication and disposition hearings. **In re D.R.F., 138.**

Preservation of issues—failure to raise issue in complaint—not procedurally barred—Plaintiff was not procedurally barred from pursuing its appeal even though it did not specifically raise the issue of the breach of the covenant against encumbrances in its complaint. Plaintiff's complaint referred to a general warranty deed, and plaintiff alleged defendants' conduct constituted breach of contract and/or breach of warranty deed. **War Eagle, Inc. v. Belair, 548.**

Preservation of issues—issue not raised at trial—failed to make offer of proof—Defendant did not preserve for appellate review his argument that the trial court erred in sustaining the prosecution's objections to defendant's cross-examination of the prosecuting witness. Defendant did not assert any constitutional claims at trial and failed to make any specific offer of proof when the trial court sustained the objections. Moreover, even if defendant had preserved this issue, he failed to show that the trial court abused its discretion. **State v. Reid, 122.**

APPEAL AND ERROR—Continued

Preservation of issues—jury instructions—Defendant properly preserved for appellate review his argument that the trial court erred in its instruction to the jury concerning the use of N.C.G.S. § 8C-1, 404(b) evidence because defendant requested a jury instruction from N.C.P.I.-Crim 104.15 at the charge conference. **State v. LePage, 37.**

Termination of parental rights—failure to appeal from adjudication order—Respondents' argument that the trial court erred in terminating their parental rights to their minor child based upon neglect was not properly preserved for appellate review. Because respondents only appealed from the dispositional order, the adjudication order in which the minor child was adjudicated neglected remained valid and final. **In re D.R.F., 138.**

ASSAULT

Knife as a deadly weapon—evidence sufficient—The defendant introduced sufficient evidence that a knife was a deadly weapon where the record established that the knife wielded by defendant produced wounds to the victim's lip, arm, and back; caused a puncture wound to the victim's lung; resulted in substantial bleeding; and inflicted injuries requiring significant medical treatment. The fact that the State did not introduce the knife in question did not bar a finding that a deadly weapon was used during the assault. **State v. Walker, 431.**

Serious injury—evidence sufficient—The trial court did not err by concluding that there was sufficient evidence to permit a jury finding that an assault defendant inflicted a serious injury on the victim. **State v. Walker, 431.**

ATTORNEY FEES

Denial of motion—employment compensation action—The trial court did not abuse its discretion by denying plaintiff's motion for attorney fees in an action involving employment compensation. **Kornegay v. Aspen Asset Grp., LLC, 213.**

Reasonableness—additional findings of fact required—The trial court erred by ordering defendant to pay additional attorney fees without making the findings of fact required by N.C.G.S. § 50-13.6 as to the reasonableness of the award. **Shippen v. Shippen, 188.**

Trial court's failure to exercise discretion—remand—The trial court erred by failing to consider plaintiff's request for attorney fees under N.C.G.S. § 75-16.1. On remand, the trial court must consider whether to exercise its discretion to award attorney fees. **MRD Motorsports, Inc. v. Trail Motorsports, LLC, 572.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Subject matter jurisdiction—indictment sufficient—The trial court did not lack jurisdiction over a first-degree burglary case where the indictment failed to allege that the breaking and entering was done "without consent" because this element is not required to be specifically pled. **State v. McCormick, 105.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Neglect—no statutory authority to require father to obtain and maintain stable employment—The trial court lacked statutory authority under N.C.G.S.

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

§ 7B-904 in a child neglect case to order respondent father to obtain and maintain stable employment. Nothing in the record suggested that respondent's employment situation, or lack thereof, led to or contributed to the juvenile's adjudication. **In re W.V., 290.**

Neglect—sufficiency of findings of fact—environment injurious to child's welfare—The trial court did not err by its findings of fact supporting its conclusion of law that the child lived in an environment injurious to his welfare and was therefore a neglected juvenile. Unchallenged findings of fact showed, among other things, that respondent grew and consumed an illegal controlled substance in the child's home, engaged in domestic violence in the child's presence, and choked the child's mother to unconsciousness while the child was *in vitro*. **In re W.V., 290.**

CHILD CUSTODY AND SUPPORT

Child support—subject matter jurisdiction—insufficient findings of fact—Although the trial court had subject matter jurisdiction and statutory authority under N.C.G.S. § 7B-904(d) to order respondent father to pay child support, the case was remanded for further findings of fact as required by N.C.G.S. §§ 7B-904(d) and 50-13.4(c), and an appropriate child support order based thereupon. **In re W.V., 290.**

CHILD VISITATION

Neglect—minimum outline required—The trial court erred in a child neglect case by failing to provide a minimum outline for respondent father's visitation, and the case was remanded for proceedings to clarify respondent's visitation rights including the establishment of a minimum outline of visitation. **In re W.V., 290.**

CITIES AND TOWNS

Fall in crosswalk—one-inch height difference from sidewalk—summary judgment for defendant—The trial court correctly granted summary judgment for defendant in a negligence action arising from plaintiff's fall in a crosswalk. Plaintiff causally linked her fall solely to a one-inch difference in the sidewalk and crosswalk, but her forecast of evidence, including falls by others, failed to establish that the defect was not trivial. Furthermore, the statute giving cities authority and control over sidewalks, N.C.G.S. § 160A-296, does not change the analysis of defendant's duty to maintain its sidewalks, nor does it appear that the building code provisions cited by plaintiff are applicable to the sidewalk in this case. **Strickland v. City of Raleigh, 176.**

CIVIL PROCEDURE

Motion for new trial—allegation untimely plead—The trial court did not err in a fraud action by denying defendants' motion for a new trial based on plaintiff's untimely identification of an alleged misrepresentation that purportedly had not been pled with sufficient particularity. **Hudgins v. Wagoner, 480.**

CONSTITUTIONAL LAW

Miranda warning—voluntary waiver—motion to suppress properly denied—The trial court in a trafficking in cocaine case did not err in denying defendant's motion to suppress statements made to law enforcement. The evidence supported the trial court's findings of fact, which supported its conclusion of law, that defendant's waiver of his *Miranda* rights was made freely, voluntarily, and understandingly. **State v. Brown, 567.**

Right to confront witnesses—report of drug test—The trial court erred by admitting over defendant's constitutional objection testimony from an SBI agent about a drug analysis performed by another agent. The witness's determination that she would have come to the same conclusion as the testing analyst was not an independent expert opinion arising from the observation and analysis of raw data; defendant could only hope to attack on cross-examination pure assumptions about whether procedures were properly followed during the testing process. The evidence was prejudicial because the only other evidence concerning the substance found was the officer's testimony that he believed it to be cocaine. **State v. Brewington, 68.**

Right to self-representation—no error—issue not preserved for appellate review—The trial court did not err by allowing defendant to represent himself because defendant's actions did not reflect mental illness, delusional thinking, or a defendant who lacked the mental capacity to conduct his trial defense unless represented. Furthermore, defendant did not preserve for appellate review his argument that he was denied his constitutional right to represent himself and present his defense because the trial court allowed jailers to seize defendant's legal papers at night when he returned to jail. **State v. Reid, 122.**

Right to trial by jury—liquidated damages—property rights not involved—A liquidated damages issue in a wage and hour claim was properly decided by the trial court where defendant asserted that the failure to submit the claim to the jury violated his constitutional right to a jury trial in actions respecting property. There is no basis for distinguishing between liquidated damages under the Wage and Hour Act and punitive damages and Rule 11 sanctions, which do not involve property rights and a constitutional right to a jury trial. **Kornegay v. Aspen Asset Grp., LLC, 213.**

CONTEMPT

Civil—willfulness—child support—postseparation support—The trial court did not err in a child support and postseparation support case by holding defendant husband in civil contempt. The trial court concluded that defendant was able to work but voluntarily quit his job and refused to take another. Defendant did not quit his job and join a religious community which prohibited its members from earning outside income or owning assets until after entry of the support order. **Shippen v. Shippen, 188.**

CONTRACTS

Failed real estate closing—conditions precedent in contract—not waived—The trial court correctly granted defendant's motion for summary judgment in an action arising from the failure of a real estate closing and a subsequent sale for a lesser amount. There was no dispute that conditions precedent in the contract were not satisfied; while plaintiff contended that defendant waived the

CONTRACTS—Continued

conditions, defendant demonstrated that he wanted the sale to go through and that the conditions precedent were not satisfied due to external factors.

Demeritt v. Springstead, 325.

Power company service contract—prima facie case of breach—evidence not sufficient—There was no genuine issue of fact as to the terms of a contract between plaintiff and defendant power companies where plaintiff testified that he neither saw, agreed to, nor signed defendants' service agreement. A reasonable mind would not accept this testimony as adequate to support the existence of contract terms as yet unidentified and summary judgment was properly granted. **Andresen v. Progress Energy, Inc., 182.**

Settlement agreement—eligibility under state retirement system—State only liable upon contracts authorized by law—Petitioner was not entitled to enforce a settlement agreement against the State Retirement System regardless of his eligibility for such benefits. The mere fact that petitioner and Department of Health and Human Services entered into a contract that both parties hoped would render petitioner eligible to receive long-term disability benefits did not automatically entitle him to receive such benefits. Although the State is bound by its contracts, it is liable only upon contracts authorized by law. **McCaskill v. Dep't of State Treasurer, 373.**

CORPORATIONS

Issuance of share certificates—summary judgment—The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claim that defendant corporation should be required to bring a claim against defendant individual to recover sale proceeds, and requesting share certificates be reissued to plaintiffs. Plaintiffs could only prevail by proving that share certificates were actually issued to them in compliance with N.C.G.S. § 55-6-25. There was no forecast of evidence of the total number of shares issued, and the percentages owned by the various alleged shareholders would be impossible to determine. **Collier v. Collier, 160.**

COSTS

Denial of directed verdict reversed—award of costs reversed—An award of costs in favor of defendant was reversed where the trial court's denial of plaintiff's motion for directed verdict on a products liability defense was reversed. **Stark v. Ford Motor Co., 1.**

CRIMINAL LAW

Judicial notice—time of sunset—no error—The trial court in a first-degree burglary case did not impermissibly supply the essential element of an act being done at "nighttime" by taking judicial notice of the time of sunset. The application of judicial notice in this case was a routine application of this evidentiary rule. **State v. McCormick, 105.**

Jury instructions—404(b) evidence—harmless error—Even if the trial court erred in instructing the jury regarding the proper use of evidence admitted under N.C.G.S. § 8C-1, Rule 404(b), given the overwhelming evidence of defendant's guilt of the charged sexual offenses, there existed no reasonable possibility

CRIMINAL LAW—Continued

that a different result would have been reached had the error not been made. **State v. LePage, 37.**

Jury instructions—first-degree sexual offense supported by the evidence—The trial court did not commit plain error in its instruction to the jury on first-degree sexual offense because the evidence was sufficient to support the trial court's instruction. **State v. LePage, 37.**

DAMAGES AND REMEDIES

Fraud—punitive damages—JNOV denied—The denial of defendants' motion for a JNOV in a fraud action on the issue of punitive damages was reversed and the matter was remanded where there was no written opinion stating the trial court's reasons for upholding the final award. **Hudgins v. Wagoner, 480.**

Fraud—real estate partners—profits—There was sufficient evidence to determine damages in a fraud action between real estate partners where the jury heard evidence from both parties about defendants' profits. Furthermore, the amount of damages was neither excessive nor contrary to law. **Hudgins v. Wagoner, 480.**

Liquidated damages—denied—The trial court did not err by denying plaintiff liquidated damages on an employment compensation claim where plaintiff's arguments required the adoption of his construction of the evidence concerning the existence of a contract. The trial court had denied plaintiff's motions for a directed verdict and a JNOV on that issue. **Kornegay v. Aspen Asset Grp., LLC, 213.**

New trial denied—remittitur—The trial court did not abuse its discretion by denying defendants' motion for a new trial on both liability and damages in an employment compensation action. The judgment was based on competent evidence, including both the jury's finding of a breach of contract and the amount of damages ultimately awarded as a result of the remittitur. **Kornegay v. Aspen Asset Grp., LLC, 213.**

Remittitur accepted—appeal on separate damages claim not barred—A plaintiff who accepted remittitur of the jury damages on a contract claim was not barred from bringing a cross-appeal on liquidated damages and attorney fees on a wage and hour claim, which is a separate claim for relief with separate remedies. **Kornegay v. Aspen Asset Grp., LLC, 213.**

DISCOVERY

Denial of motion to compel disclosure—confidential informant—The trial court did not err in a possession of cocaine with intent to sell or deliver and sale and delivery of cocaine case by denying defendant's motion to compel disclosure of the identity of a confidential informant. Defendant failed to carry his burden of showing that the facts of this case mandated disclosure when there was no forecast as to how the identity of the confidential informant could provide useful information for defendant in order to clarify any contradiction between the State's evidence and defendant's denial. **State v. Dark, 591.**

Medical review committee records—privilege not established—The trial court did not err by entering an order compelling discovery of certain documents in an employment action involving a hospital where defendant contended that

DISCOVERY—Continued

the documents had been produced by a medical review committee and were protected from discovery under N.C.G.S. § 131E-95(b). The documents did not appear to be privileged on their face, and defendant submitted no affidavits or other evidence to support its claim. **Bryson v. Haywood Reg'l Med. Ctr.**, 532.

Motion to compel—medical records—physician-patient privilege—The trial court did not abuse its discretion in a personal injuries case arising out of an automobile accident by granting defendant's motion to compel discovery. Plaintiff impliedly waived her physician-patient privilege as to medical records causally or historically related to her "great pain of body and mind." **Midkiff v. Compton**, 21.

Sanction—additional time offered—witness made available for deposition—The trial court did not abuse its discretion in choosing as a discovery sanction an order that plaintiff make the witness available for a deposition and that defendants could have additional time. The trial court prepared a well-reasoned order of 14 pages and included a careful discussion of why the trial court had reached its decision. **Kornegay v. Aspen Asset Grp., LLC**, 213.

DRUGS

Constructive possession—insufficient evidence—motion to dismiss improperly denied—The trial court erred in denying defendant's motion to dismiss charges of possession of marijuana where there was insufficient evidence that defendant constructively possessed the bags containing marijuana which were seized from a minivan. **State v. Ferguson**, 451.

Indictments fatally flawed—no subject matter jurisdiction—Defendant's convictions for delivery of a controlled substance and contaminating food with a controlled substance were vacated where the indictments for the offenses were fatally flawed. The indictments alleged that the controlled substance used by defendant was "benzodiazepines, which is included in Schedule IV of the North Carolina Controlled Substances Act[.]" but benzodiazepines are not listed in Schedule IV and there exist derivatives of the benzodiazepine category of drugs that are not listed under Schedule IV. **State v. LePage**, 37.

Possession of counterfeit controlled substance—sufficient evidence—The trial court did not err in denying defendant's motion to dismiss the charge of possession, sale, and delivery of a counterfeit controlled substance because there was sufficient evidence of each element of the offense, including that defendant represented that the substance at issue was a controlled substance. **State v. Bivens**, 350.

Trafficking in marijuana—motion to dismiss—sufficient evidence—The trial court did not err in denying defendant's motion to dismiss trafficking in marijuana charges because the State presented sufficient evidence of all the elements of the offenses, including that defendant had knowledge that boxes delivered to her apartment contained controlled substances, for the charges to be submitted to the jury. **State v. Nunez**, 164.

EMPLOYER AND EMPLOYEE

Compensation—bonuses for real estate investments—reasonable time for resale—The trial court did not err by allowing plaintiff to proceed under

EMPLOYER AND EMPLOYEE—Continued

the “reasonable time for resale” rule in an action involving bonuses for real estate investments. **Kornegay v. Aspen Asset Grp., LLC, 213.**

Compensation—existence of agreement—offer and acceptance—In a contract action over disputed employment compensation, there was sufficient evidence of an offer and acceptance to warrant denial of defendant’s motion for JNOV where plaintiff testified that he was offered the job in a conversation with defendant Steve Clardy, with the written agreement to follow. **Kornegay v. Aspen Asset Grp., LLC, 213.**

Compensation claim—findings—sufficiently specific—Findings of fact were sufficiently specific where they were adequate to set out the factual basis for the trial court’s conclusions and to explain its rationale. **Kornegay v. Aspen Asset Grp., LLC, 213.**

Contract—compensation provisions—divisible—Two portions of a disputed employment contract concerning compensation were divisible where two promises by defendant Steve Clardy were in exchange for two distinct return promises by plaintiff. The promises were not interdependent in any way. **Kornegay v. Aspen Asset Grp., LLC, 213.**

Existence of contract—reference to profits—not unduly vague—The trial court did not err in denying the defendant’s motion for a JNOV in an employment contract action that concerned the division of profits. Plaintiff’s evidence was sufficient to require that a jury decide whether a contract existed; no case was found suggesting that a reference to “profits” in an alleged contract is not sufficiently specific or certain to give rise to a contract. **Kornegay v. Aspen Asset Grp., LLC, 213.**

Wage and hour claim—bonus—notice of forfeiture—In a wage and hour claim, there was nothing to suggest that a bonus was not due plaintiff under N.C.G.S. § 95-25.7 where defendants contended that plaintiff was notified that defendants were forfeiting the bonuses before plaintiff earned them. The General Assembly did not intend to allow a bonus or commission to be cancelled or forfeited with the use of a notice as vague as the memo in question here. **Kornegay v. Aspen Asset Grp., LLC, 213.**

Wage and hour claim—failure to pay bonuses—statute of limitations—The trial court properly rejected defendant’s statute of limitations defense to a wage and hour claim concerning the failure to pay bonuses. **Kornegay v. Aspen Asset Grp., LLC, 213.**

Wage and hour claim—liquidated damages—decided by court rather than jury—The trial court did not err in a wage and hour claim by deciding the issue of liquidated damages rather than submitting it to the jury. Plain statutory language requires the employer to show “to the satisfaction of the court” that its actions were in good faith and based on reasonable grounds. **Kornegay v. Aspen Asset Grp., LLC, 213.**

Wage and hour claim—waiver of defenses—The issue of waiver of defenses to a wage and hour claim was not addressed where plaintiff impliedly consented to trial of the issue. **Kornegay v. Aspen Asset Grp., LLC, 213.**

ENVIRONMENTAL LAW

Existing buffer zone violation—actionable encumbrance—breach of contract—The trial court erred in a breach of contract case by failing to recognize the existing buffer zone violation as an actionable encumbrance within the meaning of defendant's covenant against encumbrances. **War Eagle, Inc. v. Belair, 548.**

Riparian buffer zone—prior knowledge of violation does not defeat claim—The trial court erred in a breach of contract case by granting summary judgment in favor of defendant grantors based on plaintiff grantee's prior knowledge of the violation of a riparian buffer zone on the pertinent property. A plaintiff's prior knowledge of an encumbrance does not defeat his claim to recover for breach of the covenant against encumbrances contained in a warranty deed. Although plaintiff was entitled to summary judgment on the issue of liability, the case was remanded to the trial court for a determination of the amount of damages. **War Eagle, Inc. v. Belair, 548.**

ESTOPPEL

Judicial estoppel—conversion—contradictory statements of ownership in federal bankruptcy court and state court—The trial court did not abuse its discretion in a conversion case by applying judicial estoppel and granting summary judgment in favor of defendant in regard to contested funds received from the parties' deceased brother. To allow plaintiff to seek recovery of the now contested monies from defendant would permit him to file contradictory statements of ownership in the federal bankruptcy court and the state court. Plaintiff would receive an unfair advantage because it would be inequitable to allow him to assert the right to recoup an amount in excess of \$92,000 when plaintiff only disclosed that he was entitled to \$24,797.14 in his filings in the bankruptcy court. **Bioletti v. Bioletti, 270.**

Settlement agreement—no justifiable reliance—The State Retirement System was not estopped from denying petitioner's claim for long-term disability benefits, and the trial court did not err by concluding that neither the elements of estoppel nor quasi-estoppel were present in this case. The failure of the parties to submit the settlement agreement for approval by the Office of State Personnel as required by 25 N.C.A.C. 1B.0436 or consult with the Retirement System precluded anyone from justifiably relying on the beliefs of the relevant Department of Health and Human Services officials that the approach adopted in that agreement would pass muster with the Retirement System. **McCaskill v. Dep't of State Treasurer, 373.**

EVIDENCE

Controlled substances—lay opinion testimony—no plain error—The trial court in a controlled substances case did not commit plain error by allowing a police officer to testify that substances found in a minivan and in defendant's pocketbook were marijuana. The decision in *State v. Llamas-Hernandez*, 363 N.C. 8, did not mandate a new trial in this case and the officer had as much or more training and experience in drug identification as the officer whose testimony was held admissible in *State v. Fletcher*, 92 N.C. App. 50. **State v. Ferguson, 451.**

EVIDENCE—Continued

Expert opinion—no error—The trial court did not err in allowing an expert to testify that the victim and several of the victim's siblings were victims of ritualistic child abuse, sadistic child abuse, and torture. The expert's testimony did not amount to inadmissible opinion testimony on the credibility of the victim's siblings and the trial court's admission of the expert's testimony regarding the use of the word "torture" was not an abuse of discretion. **State v. Paddock, 280.**

Lay opinion—hydrocodone—visual identification—chemical analysis required—The trial court committed plain error in a drug case by admitting an SBI drug chemist's opinion testimony based on visual identification, without any actual chemical analysis, that the 40 pills found in defendant's possession were 38.2 grams of hydrocodone. The testimony, although supported by experience and education, was tantamount to baseless speculation and equivalent to testimony of a layperson. **State v. Brunson, 357.**

Prior bad acts—admissible under Rules 404(b) and 403—The trial court in a felonious child abuse inflicting serious bodily injury and first-degree murder case did not abuse its discretion in admitting evidence of defendant's abuse of all her surviving children. The evidence was admissible under N.C.G.S. § 8C-1, 404(b) to show defendant's intent, plan, scheme, system, or design to inflict cruel suffering on the victim, as well as malice and lack of accident, and the probative value of the evidence was not substantially outweighed by its prejudicial effect. **State v. Paddock, 280.**

Prior bad conduct—civil fraud—unrelated felony—The trial court did not err in a fraud action by allowing the jury to hear testimony concerning an unrelated felony to which defendant Wagoner had pled guilty. The only information the jury heard was that Wagoner had lost his real estate broker's license; all information about the felony was discussed outside the presence of the jury. **Hudgins v. Wagoner, 480.**

Prior crimes or bad acts—harmless error—Even assuming *arguendo* that the trial court erred in a sexual offense case by admitting evidence of defendant's prior sexual actions, the error was harmless where there was overwhelming evidence of defendant's guilt in this case. **State v. LePage, 37.**

Out-of-court statement—generally consistent with in-court testimony—The trial court did not err by allowing an officer to testify concerning an out-of-court statement by a witness in a prosecution that resulted in an assault conviction. Although the out-of-court statement contained information that did not appear in the witness's in-court testimony, the out-of-court statement was generally consistent with her trial testimony. Furthermore, the trial court gave a limiting instruction. **State v. Walker, 431.**

FRAUD

Intent to deceive—evidence—more than scintilla—There was more than a scintilla of evidence in a fraud action from which the jury reasonably could have concluded that defendant Wagoner intended to deceive plaintiff and had no intention of complying with his statement that he would let plaintiff know if they were going to extend an option or do anything else on a property. **Hudgins v. Wagoner, 480.**

FRAUD—Continued

Misrepresentation—evidence—not overly vague—Plaintiff's evidence of a false representation was not too vague to support a claim of fraud between real estate partners where defendant Wagoner told plaintiff that he would be informed if they were going to extend the option or do anything else on the property. **Hudgins v. Wagoner, 480.**

Pleading—misrepresentation—sufficiently particular—Plaintiff's complaint alleging fraud between real estate partners was sufficiently particular where plaintiff alleged that a misrepresentation was made during a conversation and that defendants purchased and hid property from plaintiff, entitling him to compensatory and punitive damages. **Hudgins v. Wagoner, 480.**

IMMUNITY

Governmental—insurance exclusion—Summary judgment should have been granted for defendant in a wrongful death action against a social services agency and its director where the unambiguous language of the insurance contract states that it provides no coverage as to claims for which the covered person is protected by sovereign immunity. **Estate of Earley v. Haywood Cnty. Dep't of Soc. Servs., 338.**

Sovereign immunity—failure to allege waiver—dismissal of claim—The trial court did not err in a declaratory judgment action seeking to void various zoning ordinances by dismissing under N.C.G.S. § 1A-1 Rule 12(b)(6) plaintiff's claim requiring sewer line capping and claim for garbage removal services based on failure to allege a waiver of sovereign immunity. Plaintiff failed to argue an abuse of discretion by the trial court and thus failed to meet his burden on appeal. **Schwarz Properties, LLC v. Town of Franklinville, 344.**

INDICTMENT AND INFORMATION

First-degree burglary—nominal error—indictment not fatally defective—The trial court did not err in denying defendant's motion to dismiss the charge of first-degree burglary because there was no fatal variance between the indictment and the proof adduced at trial. Although the indictment alleged that the breaking and entering occurred at 407 Ward's Branch Road and the evidence indicated that the house number was 317, this was a nominal or inconsequential error which did not render the indictment fatally defective. **State v. McCormick, 105.**

INJUNCTIONS

Dissolution of temporary restraining order—recovering costs of defense as damages—The trial court did not err in a declaratory judgment action seeking to void various zoning ordinances by awarding costs of defense to defendant upon dismissal of a temporary restraining order (TRO) obtained without malice or want of probable cause. There are no cases holding that damages under N.C.G.S. § 1A-1, Rule 65(e) cannot include the costs of defending against a TRO. **Schwarz Properties, LLC v. Town of Franklinville, 344.**

INSURANCE

Homeowner's insurance—partial summary judgment—breach of contract—appraisal process—The trial court did not err in a declaratory judgment action seeking an appraisal amount for a homeowner's insurance claim by granting partial summary judgment in favor of defendant on a counterclaim for breach of

INSURANCE—Continued

contract and awarding defendant the full appraisal value for damage to the house caused by wind. Defendant presented sufficient evidence of a disagreement as to the value of the damage to enter into the appraisal process under the terms of the insurance policy. Further, the trial court's appointment of an umpire absent a representative appraiser by plaintiff insurance company was proper. Appraisal awards are assumed to be valid and binding absent evidence of fraud, duress, or other impeaching circumstances. **N.C. Farm Bureau Mut. Ins. Co., Inc. v. Sadler, 145.**

JUDGMENTS

Default judgment—abuse of discretion—failure to award treble damages—unfair trade practices—The trial court abused its discretion by failing to award treble damages under N.C.G.S. § 75-16 against defendants Trail and Shelton when plaintiff elected this remedy in its motion for default judgment. Defendants Shelton and Trail's liability for unfair and deceptive trade practices was sufficiently alleged and deemed admitted. Although defendants Shelton and Trail may be held jointly and severally liable for the full amount of damages as trebled, defendant Fitz may be held jointly and severally liable with these defendants only for \$66,000 of the \$198,000 total damage award. **MRD Motorsports, Inc. v. Trail Motorsports, LLC, 572.**

JURISDICTION

Subject matter—claim properly dismissed—The trial court did not err in dismissing plaintiff's amended claim for relief, which was predicated upon plaintiff's prediction that he would prevail in a related administrative litigation. Because the factual prerequisite for the maintenance of the claim had not yet occurred, the trial court did not have subject matter jurisdiction over the claim. **Reese v. Mecklenburg Cnty., N.C., 410.**

Subject matter—defendant able to be tried as an adult—The trial court had subject matter jurisdiction over a sexual offenses case because defendant was 16 years old during the period of time that the superseding indictment alleged that defendant committed the charged offenses. **State v. Pettigrew, 248.**

Subject matter—standing—navigable waters—Plaintiff's argument that the trial court erred in determining whether a canal was navigable because defendant had no standing to litigate the rights of the State of North Carolina was overruled because defendant raised navigable waters as a defense to plaintiff's trespass claim and was not seeking monetary damages for interference with navigable waters. **Fish House, Inc. v. Clarke, 130.**

JURY

Individual polling—no error—The trial court did not err by failing to separately inquire whether the jurors in a possession of controlled substance case assented to the verdicts in the jury room and in the courtroom. The clerk asked each individual juror in open court whether the verdict announced was his or her verdict, which met the requirements of N.C.G.S. § 15A-1238. **State v. Lackey, 153.**

Instructions—Allen charge—no error—The trial court in a possession of cocaine case did not commit plain error by giving the jury an *Allen* instruction after the jury had deliberated for an hour and a half and before the jury retired

JURY—Continued

to continue deliberations. The instruction was in accordance with N.C.G.S. § 15A-1235 (a) and (b) and was not an abuse of discretion. **State v. Lackey, 153.**

Instructions—conspiracy—no error—The trial court did not commit error, much less plain error, in its instructions to the jury on the charge of conspiracy by not specifically naming the individual with whom defendant was alleged to have conspired. The trial court's instruction was in accord with the material allegations in the indictment and the evidence presented at trial. **State v. Pringle, 562.**

Instructions—no error—The trial court did not err by failing to give the jury instruction requested by defendant on the full definition of a counterfeit controlled substance set forth in N.C.G.S. § 90-87 because defendant failed to submit his request for the special instruction in writing. Moreover, the jury instruction given by the trial court was adequate for a jury to determine whether the substance at issue was intentionally misrepresented. **State v. Bivens, 350.**

MEDICAL MALPRACTICE

Rule 9(j) certification—reasonable expectation of qualifications—The trial court erred by granting summary judgment on a medical malpractice claim in favor of defendants. Plaintiff reasonably expected that two witnesses would have been qualified under N.C.G.S. § 8C-1, Rule 702, thus satisfying the pleading requirements of N.C.G.S. § 1A-1, Rule 9(j). **Grantham v. Crawford, 115.**

NEGLIGENCE

Contributory negligence—summary judgment erroneously granted—The trial court erred in granting summary judgment in favor of defendants on plaintiff's negligence claim. Defendants failed to establish as a matter of law that plaintiff was contributorily negligent as there was a genuine issue of material fact concerning the reasonableness of plaintiff's conduct. **Tyburski v. Stewart, 540.**

PARTIES

Motion to intervene or be joined as party—real party in interest—The trial court erred by denying the current property owner's motion to intervene or be joined as a party in a case regarding DOT's denial of an application for a driveway permit. The trial court's failure to join the real party in interest before addressing the merits required the order to be set aside and remanded for an order joining the property owner as a party, and for reconsideration of the petition for judicial review. **High Rock Lake Partners, LLC v. N.C. Dep't of Transp., 55.**

PENSIONS AND RETIREMENT

Settlement agreement—long-term disability benefits—eligibility under State Retirement System—unpaid leave inapplicable—The trial court did not err by concluding that the parties' settlement agreement did not provide petitioner with sufficient "membership service" to render him eligible to receive long-term disability benefits under the State Retirement System. Generally, an employee gets a day's credit for a day's work. Eligibility for long-term disability benefits does not include periods when an employee is on unpaid leave. Further, 25 N.C.A.C. 1B.0436 requires the submission of a settlement agreement to the Office of State Personnel for approval, and Department of Health and Human Services

PENSIONS AND RETIREMENT—Continued

was not entitled to provide petitioner with binding assurances that the retirement system would accept the approach adopted in the settlement agreement.

McCaskill v. Dep't of State Treasurer, 373.

PLEADINGS

Answers and counterclaims—motion to strike attachment—properly denied—The trial court did not err by denying plaintiff's motion to strike an exhibit attached to defendants' answers and counterclaims. The trial court did not abuse its discretion by concluding that the material contained in the attachment had some "possible bearing upon the litigation." **Reese v. Mecklenburg Cnty., N.C., 410.**

Judgment on the pleadings—properly granted—The trial court did not err in entering judgment on the pleadings on plaintiff's first claim for relief, requesting a determination that a resolution authorizing defendant county's purchase of certain real property was invalid. Plaintiff's allegations were insufficient to establish the manifest abuse of discretion necessary to set aside defendant county's purchase of the real property. **Reese v. Mecklenburg Cnty., N.C., 410.**

Judgment on the pleadings—properly granted—The trial court did not err in entering judgment on the pleadings on plaintiff's second claim for relief, seeking entry of an order nullifying a contract entered into by defendant county for the purchase of real property. Plaintiff's claim failed to allege a manifest abuse of discretion on the part of defendant county. **Reese v. Mecklenburg Cnty., N.C., 410.**

Judgment on the pleadings—properly granted—The trial court did not err in entering judgment on the pleadings on plaintiff's fourth claim for relief, challenging the approval of financing for defendant county's purchase of certain real property. Plaintiff's allegations were merely conclusory and did not allege the facts necessary to establish a manifest abuse of discretion by defendant county. **Reese v. Mecklenburg Cnty., N.C., 410.**

Judgment on the pleadings—properly granted—The trial court did not err in entering judgment on the pleadings on plaintiff's third claim for relief, seeking the nullification of an ordinance appropriating money to fund defendant county's acquisition of property for an urban park. As the trial court properly granted judgment on the pleadings in favor of defendants on plaintiff's first, second, and fourth claims, this claim failed as well. **Reese v. Mecklenburg Cnty., N.C., 410.**

PROBATION AND PAROLE

Reasonable reliance—defendant's statement—plaintiff's action—A jury could have found reasonable reliance by plaintiff on defendant's statement in a fraud action involving real estate partners where plaintiff regularly searched Multiple Listing Service reports after defendant Wagoner told him that he would be informed if anything was done with the property. **Hudgins v. Wagoner, 480.**

Revocation—subject matter jurisdiction—same county as initial order—Buncombe County had subject matter jurisdiction for revoking defendant's probation where the initial probation was entered in Buncombe County. **State v. Mauck, 583.**

PROBATION AND PAROLE—Continued

Revocation—subject matter jurisdiction—transfer between counties—The trial court in Buncombe County had jurisdiction under N.C.G.S. § 15A-1344(a) to revoke defendant's probation where the original probation was entered in Haywood County but was later modified in Buncombe County. Defendant did not appeal from the modification of the order in Buncombe County, so that the notice of appeal required for jurisdiction was not proper, and the record did not include information which would be necessary for the Court of Appeals to determine if there was any impropriety in the transfer of the defendant's case from Haywood County to Buncombe County. **State v. Mauck, 583.**

PRODUCTS LIABILITY

Child injured by seatbelt—evidence sufficient—Plaintiff presented sufficient evidence to survive defendant's motions for summary judgment and directed verdict where a child was injured by her seatbelt in an accident. Plaintiffs offered evidence that tended to show that defendant manufactured a product which had the potential to cause the injury and that defendant did not use alternative designs that were available and used by defendant in similar products. **Stark v. Ford Motor Co., 1.**

Defense—alteration or misuse—party to action—The trial court erred in a products liability action by denying plaintiffs' motion for a directed verdict on the defense of alteration or misuse where a father who was not a party to the action was alleged to have placed the seatbelt behind the child's back. The plain language of N.C.G.S. § 99B-3 states that the entity responsible for the modification or misuse of the product must be a party to the action in order for the defense to apply. **Stark v. Ford Motor Co., 1.**

Defense—alteration or misuse—seven-year-old child—The products liability defense of alteration or modification was not applicable to a child under seven years of age injured by a seat belt because children that age are not capable of negligence. Defendant was unable as a matter of law to prove the requisite element of foreseeability inherent in the proximate cause portion of its N.C.G.S. § 99B-3 defense. **Stark v. Ford Motor Co., 1.**

REAL PROPERTY

Foreclosure—power of sale—insufficient evidence of assignment of note—The trial court erred in authorizing Monica Walker, Matressa Morris, and Nationwide to act as substitute trustees and proceed with foreclosure under a power of sale of real property owned by respondents. The appointment of the substitute trustees identified Deutsche Bank for Soundview as the owner and holder of the note executed on the property which was originally payable to Novastar, but there was insufficient evidence that the note had been transferred and assigned to Deutsche Bank for Soundview. **In re Foreclosure of Adams, 318.**

SEARCH AND SEIZURE

Digital scale—further warrantless search—The facts supported the trial court's conclusions, the conclusions on probable cause were not inconsistent, and the trial court did not err by concluding that the discovery of a digital scale created grounds for a further search of defendant without a warrant. **State v. Morton, 578.**

SEARCH AND SEIZURE—Continued

Digital scale seized from pocket—reasonable and justified—The facts plus an informant's tip were sufficient to support the trial court's conclusion that an officer was reasonable and justified in seizing a digital scale from defendant. **State v. Morton, 578.**

Findings—reasonable suspicion to search—scope of stop—Challenged findings concerning reasonable suspicion to search defendant and whether informants were reliable were settled in an earlier appeal, and the question of whether the officer exceeded the scope of the stop was settled above. **State v. Morton, 578.**

Investigatory stop—no reasonable suspicion—motion to suppress improperly denied—The trial court in a possession of heroin case erred in denying defendant's motion to suppress evidence discovered as a result of a police officer's search of defendant. The officer lacked reasonable suspicion to effectuate an investigatory stop of defendant where the officer knew that the suspects were described as being approximately 18 years old, while defendant was 51 years old at the time of the stop. **State v. Huey, 513.**

Motion to suppress—anonymous tip—insufficient indicia of reliability—The trial court erred in denying defendant's motion to suppress evidence seized in connection with his detention and the search of his vehicle. The anonymous tip by which officers justified the warrantless stop of defendant's car did not contain sufficient indicia of reliability. Moreover, *Arizona v. Gant*, 556 U.S. —, applies retroactively and the search of defendant's car following his arrest for driving with a suspended license was unconstitutional. **State v. Johnson, 259.**

Motion to suppress—informant's tip—reasonable suspicion—investigatory stop—The trial court did not err in a trafficking in cocaine by possession and possession of a firearm by a felon case by denying defendant's motion to suppress the evidence obtained by officers from the stop of his vehicle based on an informant's tip. The police chief had known the informant personally for thirteen years, and he was able to confirm with the county drug task force that the informant's previous information was reliable and had resulted in an arrest. The totality of circumstances gave the officers a reasonable articulable suspicion that defendant was transporting drugs, and thus probable cause to arrest and search defendant's vehicle. **State v. Crowell, 362.**

Probable cause—motion to suppress improperly granted—exigent circumstances—The trial court in a possession of marijuana case erred by finding and concluding that exigent circumstances did not exist to justify a search of a spare tire located underneath defendant's vehicle without a search warrant and suppressing the marijuana found therein. The search of the inside of defendant's vehicle was within the scope of defendant's consent and the discovery of marijuana inside a tire located in the vehicle was sufficient probable cause to allow the officer to search every part of the vehicle, including the tire located underneath the vehicle. **State v. Toledo, 170.**

SENTENCING

Consecutive sentences—two trafficking in marijuana offenses—The trial court erred in imposing consecutive sentences as a matter of law on defendant for his convictions of two trafficking in marijuana offenses. While N.C.G.S.

SENTENCING—Continued

§ 90-95 mandates that when sentencing a defendant for trafficking in marijuana pursuant to subsection (h) of N.C.G.S. § 90-95, the trial court must run the sentence consecutively to any sentence the defendant is currently serving, it does not mean that when a defendant is convicted of multiple trafficking offenses at a term of court that those sentences, as a matter of law, must run consecutively to each other. The trial court had the discretion to run defendant's sentences consecutively or concurrently. **State v. Nunez, 164.**

Not cruel and unusual punishment—Defendant's sentence of 32 to 40 years in prison for his conviction of two counts of first-degree sexual offense against his half brother was not cruel and unusual punishment in light of the Supreme Court's decision in *State v. Green*, 348 N.C. 588. **State v. Pettigrew, 248.**

Not cruel and unusual punishment—habitual felon—Defendant's argument that his prison sentence of 84 to 110 months was grossly disproportionate to his crime of possession of 0.1 grams of cocaine and constituted cruel and unusual punishment was overruled. Defendant did not argue that he suffered from an abuse of discretion, procedural misconduct, circumstances which manifested an inherent unfairness or injustice, or conduct offending a public sense of fair play and defendant was sentenced as an habitual felon in accordance with N.C.G.S. § 14-7.6. **State v. Lackey, 153.**

Out-of-state conviction—felony or substantially similar—The trial court did not err in sentencing defendant as a prior record level II offender based on his out-of-state conviction in federal court for conspiracy to distribute cocaine. Defendant's stipulation to the existence of his prior felony conviction, along with his failure to object to the sentencing worksheet, was sufficient evidence to show that the point value of defendant's out-of-state conviction was a felony or "substantially similar" to a Class A1 or Class 1 misdemeanor. **State v. Bethea, 587.**

SEXUAL OFFENDERS

Satellite-based monitoring—indecent liberties conviction—parole violations—The trial court erred by ordering satellite-based monitoring upon a conviction for an aggravated offense where defendant was convicted of indecent liberties. On remand, the trial court can consider the number and frequency of defendant's probation violations as well as the nature of the conditions violated in making its determination. **State v. King, 198.**

Satellite-based monitoring—does not violate prohibition against ex post facto laws—The trial court did not err by ordering defendant to enroll in lifetime satellite-based monitoring for her convictions of indecent liberties with a child. Even though the crimes were committed before the effective date of N.C.G.S. § 14-208.40B, the application of this statute does not violate the constitutional prohibition against *ex post facto* laws. **State v. Bowlin, 206.**

Satellite-based monitoring—recidivist—The trial court did not err by requiring defendant to enroll in satellite-based monitoring (SBM) for 10 years based on the fact that he was a recidivist. Defendant failed to present any new factual information to support his arguments that SBM is punitive in effect, and his constitutional arguments have previously been rejected. The Court of Appeals noted that the State should have cross-appealed the term of 10 years because N.C.G.S. § 14-208.40B(c) requires life enrollment for a recidivist. **State v. Yow, 203.**

SEXUAL OFFENDERS—Continued

Satellite-based monitoring—sexual battery not an aggravated offense—The Court of Appeals exercised its discretion under N.C. R. App. P. 2 and determined that the trial court erred in an assault by strangulation and sexual battery case by requiring defendant to enroll in lifetime satellite-based monitoring. Sexual battery is not an “aggravated offense” for the purposes of N.C.G.S. § 14-208.40B. **State v. Brooks, 193.**

SEXUAL OFFENSES

Sufficient evidence—bill of particulars—The trial court did not err in denying defendant’s motion to dismiss charges of first-degree sexual offense because there was substantial evidence that the victim was abused within the time period alleged in the bill of particulars. **State v. Pettigrew, 248.**

STATUTES OF LIMITATION AND REPOSE

Fraud—reasonable diligence—In a fraud action involving activities by real estate partners in which the statute of limitations was raised, the trial court correctly denied defendant’s motion for JNOV and allowed the jury to determine whether plaintiff exercised reasonable diligence to discover defendants’ activities. **Hudgins v. Wagoner, 480.**

Zoning ordinance or amendment—two months—The trial court did not err in a declaratory judgment action seeking to void various zoning ordinances by applying a two-month statute of limitations. N.C.G.S. § 160A-364.1 provides that a cause of action as to the validity of a zoning ordinance or amendment must be brought within two months of its adoption, and plaintiff’s complaint was filed more than a year after the statute of limitations had run. **Schwarz Properties, LLC v. Town of Franklinville, 344.**

SURETIES

Accommodation makers—summary judgment—genuine issue of material fact—fraud—negligence—unfair trade practices—The trial court erred in a case arising out of loan defaults by granting summary judgment in favor of defendant bank on all claims including fraud in the inducement, actual fraud, negligence, and unfair trade practices. The record raised a genuine issue of material fact as to whether plaintiffs were induced to enter into a contract to help their extended family receive financing for a greenhouse in which plaintiffs had no ownership interest or financial benefit, in ignorance of facts materially increasing the risk of which defendant had knowledge, and defendant had an opportunity before accepting plaintiffs’ undertaking to inform plaintiffs of such facts. Further, there was a genuine issue of material fact as to whether plaintiffs were accommodation makers. **Whisnant v. Carolina Farm Credit, ACA, 84.**

TERMINATION OF PARENTAL RIGHTS

Disposition—best interests of the child—no abuse of discretion—The trial court did not abuse its discretion in a termination of parental rights case by ordering the minor child be adopted by the child’s foster parents instead of placing the child in kinship placement. The trial court made findings of fact concerning the statutory factors in N.C.G.S. § 7B-1110(a) and clearly considered the child’s best interests. **In re D.R.F., 138.**

TERMINATION OF PARENTAL RIGHTS—Continued

Guardian ad litem for parent—not appointed—The trial court did not abuse its discretion by not appointing a guardian *ad litem* for respondent mother in a termination of parental rights hearing where there was no evidence presented of any circumstance which would call into question respondent-mother's mental competence, her ability to perform mentally, or to act in her own interest. **In re A.R.D., 500.**

Representation of parent by counsel—remanded for further determination—A termination of parental rights order was remanded for a determination by the trial court regarding efforts by respondent's counsel to contact and adequately represent respondent at the termination hearing and whether respondent is entitled to appointment of counsel in a new termination hearing. **In re S.N.W., 556.**

Termination order—not timely entered—not prejudicial—There was no prejudicial error in a termination of parental rights action by the trial court's failure to enter the termination order within ninety days of the filing of the petition to terminate her parental rights. Additional visits with the child or a custody hearing would not have changed the ultimate outcome of the termination proceeding. **In re A.R.D., 500.**

TORT CLAIMS ACT

Statute of repose inapplicable—actually constructed improvement required—The Industrial Commission did not err by concluding that the six-year statute of repose under N.C.G.S. § 1-50(a)(5) relating to claims arising out of a defective or unsafe improvement to real property did not apply to plaintiffs' negligence claim for damages arising out of misrepresentations that certain real property perked and a home could be built on the property. N.C.G.S. § 1-50(a)(5) requires that the action relate to an actually constructed improvement, and no such improvement existed in this case. Defendant failed to demonstrate that any other statute would render the action untimely. **Dawson v. N.C. Dep't of Env't & Natural Res., 524.**

TRESPASS

Navigable waters—public trust doctrine—The trial court did not err in dismissing plaintiff's trespass action because the manmade canal upon which defendant allegedly trespassed was a navigable waterway held by the State in trust for all citizens of North Carolina pursuant to the public trust doctrine. **Fish House, Inc. v. Clarke, 130.**

Navigable waters—title to land—immaterial—Plaintiff's argument that the trial court erred in dismissing its trespass claim because it was immaterial that plaintiff did not allege title to the land in question was dismissed because the canal at issue was navigable water subject to the public trust doctrine. **Fish House, Inc. v. Clarke, 130.**

TRIALS

Closing argument—attorney's belief—no intervention ex mero motu—The trial court did not abuse its discretion in a fraud action by not intervening *ex mero motu* in plaintiff's closing argument. The argument included statements that could be construed as the attorney's personal belief that defendant Wagoner was lying, but did not actually say that Wagoner was lying. **Hudgins v. Wagoner, 480.**

UTILITIES

Underground power line—no duty to inspect—The trial court correctly granted summary judgment for defendants in a negligence action arising from a damaged underground power line where plaintiffs did not establish a duty to periodically unearth and inspect the line. **Andresen v. Progress Energy, Inc., 182.**

VENUE

Change of venue—necessary parties—trust beneficiaries—A change of venue order in a trust action was reversed where the remainder beneficiaries of the trust, who were not initially included, were necessary parties because they would be affected by the adjudication of the action. The change of venue was not addressed on appeal because the remainder beneficiaries may also have interests in regard to venue which are properly addressed after they have been joined in the action. **Dunn v. Cook, 332.**

WATERS AND ADJOINING LANDS

Navigable canal in its entirety—no error—The trial court did not err in determining that a canal was navigable in its entirety because plaintiff's complaint did not limit its trespass claim to any particular portion of the canal and defendant did not limit its defense of navigability to a specific portion of the canal. **Fish House, Inc. v. Clarke, 130.**

WILLS

Declaratory judgment—life estate—termination upon occurrence of one or more events—The trial court erred in a declaratory judgment action by construing Item II.B.6 of decedent's will to provide that Ms. Frejlach's life estate terminated if she used the pertinent house or property for business purposes, as a bed and breakfast, or if she leased the house or property. However, the trial court did not err by concluding that Ms. Frejlach's life estate was subject to termination in the event that she did not reside in the house or ceased to reside in the house on the property. **Nelson v. Bennett, 467.**

WORKERS' COMPENSATION

Mutual assistance agreement between town and university police departments—mounted patrol at university football game—town required to pay for injuries—The Industrial Commission did not err in a workers' compensation case by concluding that defendant town was responsible for payment of sums due to plaintiff police officer under the provisions of Chapter 97 of the North Carolina General Statutes. The town and university police departments substantially complied with the requirements of a mutual assistance agreement under N.C.G.S. § 160A-288, and it was undisputed that the officer sustained an injury arising out of and during the course of his employment when he was working as a mounted patrol officer at a university football game with powers to arrest. Further, the parties mutually agreed to the payment arrangement coming directly from the university. **Taylor v. Town of Garner, 300.**